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In the Supreme Court of the United States

OCTOBER TERM, 1972

FEDERAL POWER COMMISSION, PETITIONER

v.

NEW ENGLAND POWER COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
A. Background	4
B. Proceedings before the Commission	7
C. The decision below	10
Reasons for granting the writ	11
Conclusion	17
Appendix A, opinion of the court of appeals	1a
Appendix B, judgment of the court of appeals	14a
Appendix C, order of the court of appeals denying rehearing	16a
Appendix D, Federal Power Commission Order No. 427	18a
Appendix E, Federal Power Commission order denying rehearing	51a
Appendix F, Bureau of the Budget Circular No. A-25	61a
Appendix G, opinion of the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States*	63a

TABLE OF CITATIONS

Cases:

Clay Broadcasting Corp. v. *United States*, 464 F.2d 1313, petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States, et al.*, No. 72-948 ..... 7, 12, 14, 15, 16

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 14

Statutes and regulations:

Federal Power Act, 16 U.S.C. 791a, *et seq.*: 2, 4, 8

Section 10(e), 16 U.S.C. 803(e) 4

Section 10(f), 16 U.S.C. 803(f) 4

Section 201(b) and (e), 16 U.S.C. 824(b) and (e) 4

Section 301, 16 U.S.C. 825 9

Section 313(b), 16 U.S.C. 825*l*(b) 2

Independent Offices Appropriations Act, 1952, Title V 65 Stat. 290, 31 U.S.C. 483a ... 2, 3, 4, 5, 6, 11, 12, 13, 15, 16

Natural Gas Act, 52 Stat. 821, *et. seq.*, as amended, 15 U.S.C. 717, *et seq.*: 2, 4

Page

Statutes and regulations—Continued
Section 2(5), 15 U.S.C. 717a(5) 2
Section 2(6), 15 U.S.C. 717a(6) 4
Section 8, 15 U.S.C. 717g 9
Section 19(b), 15 U.S.C. 717r(b) 2
18 C.F.R. 11.20 4
18 C.F.R. 11.30 4
18 C.F.R. 260.7 9
Miscellaneous:
23 FCC 2d 880, 35 Fed. Reg. 10988 7
35 FPC 30, 31 Fed. Reg. 431, 4890 6
Hearings before a Subcommittee of the House Committee on Appropriations, 91st Cong., 2d Sess., on Independent Offices and Department of Housing and Urban Development Appropriations for 1971 7
Hearings before a Subcommittee of the House Committee on Appropriations, 92d Cong., 1st Sess., on Public Works for Water and Power Development and Atomic Energy Commission Appropriation Bill, 1972 12
H. Rep. No. 384, 82d Cong., 1st Sess. 5
H. Rep. No. 1348, 90th Cong., 2d Sess. 6
Notice of Proposed Rulemaking, Docket No. R-408, issued November 25, 1970, 35 Fed. Reg. 18324 7
Priest, 1 *Principles of Public Utility Regulation* (1969) .. 14
S. Rep. No. 1375, 90th Cong., 2d Sess. 6

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-13a) is reported at 467 F.2d 425. The initial order (No. 427) of the Federal Power Commission (App. D, *infra*, pp. 18a-50a) and its order denying rehearing (App. E, *infra*, pp. 51a-60a) are reported at 45 FPC 440 and 45 FPC 964.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1972 (App. B, *infra*, pp. 14a-15a), and the Commission's petition for rehearing was denied on September 25, 1972 (App. C, *infra*, pp. 16a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has authority under Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a) to recoup a portion of its costs of administering the Federal Power Act, 16 U.S.C. 791a, *et seq.*, and the Natural Gas Act, 15 U.S.C. 717, *et seq.*, through the imposition of annual fees on companies subject to its jurisdiction after taking into consideration the benefits such companies receive from Commission regulation.

STATUTE INVOLVED

Title V of the Independent Offices Appropriations Act, 1952, 65 Stat. 290, 31 U.S.C. 483a, provides:

> It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act

of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

STATEMENT

This case involves the authority of federal agencies under Title V of the Independent Offices Appropria-

tions Act, 1952 (31 U.S.C. 483a) to recoup their administrative costs from the companies they regulate. The court of appeals construed Title V as not authorizing the Federal Power Commission to assess annual fees against public utilities[1] and natural gas companies[2] subject to its jurisdiction to recover those administrative costs not recouped by specific filing and other fees (App. A, *infra*, pp. 1a-13a).

A. BACKGROUND

Since the enactment of the Federal Water Power Act of 1920, now Part I of the Federal Power Act, 16 U.S.C. 791a-823, the Federal Power Commission has assessed annual and other charges against licensees of hydroelectric projects to reimburse the United States for the Commission's costs of administering the Act. The imposition of these charges is specifically authorized by Part I of the Act. See 16 U.S.C. 803(e) and (f); 18 C.F.R. 11.20, 11.30. However, neither Parts II and III of the Federal Power Act, 16 U.S.C. 824, *et seq.*, nor the Natural Gas Act, 15 U.S.C. 717, *et seq.*, specifically direct the Commission to assess annual or other charges against companies subject to those statutes; accordingly, no charges were imposed.

In 1951, Congress enacted Title V of the Independent

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[1] Under Section 201(b) and (e) of the Federal Power Act, 16 U.S.C. 824(b) and (e), a "public utility" is defined as any person who owns or operates facilities for the transmission or sale for resale of electric energy in interstate commere.

[2] Under Section 2(6) of the Natural Gas Act, 15 U.S.C. 717a(6), a "natural-gas company" is defined as a person engaged in the transportation or sale for resale of natural gas in interstate commerce.

Offices Appropriations Act, 1952 (31 U.S.C. 483a). The House report on Title V shows that Congress was concerned that the government was not receiving full return for many of the services it was providing to special beneficiaries. The report noted that in some cases "no fees are charged even though the charging of fees is not prohibited * * *." H. Rep. No. 384, 82d Cong., 1st Sess., p. 2. To remedy this situation, Title V was proposed to

> * * * provide authority for Government agencies to make charges for * * * services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. * * * [*Id.* at 3.]

As enacted, Title V provides in essence that any work, service, benefit or privilege performed, provided or granted by any federal agency to any person shall be self-sustaining to the fullest extent possible. Accordingly, the federal agencies are authorized to prescribe fees and charges which are

> * * * fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *. [31 U.S.C. 483a.]

All amounts collected under the statute are to be paid into the United States Treasury as miscellaneous receipts.

Bureau of the Budget Circular No. A-25 (September 23, 1959; set forth in App. F, *infra*, pp. 61a-62a)

establishes guidelines to assist agencies in the implementation of Title V. The circular directs that where a service bestows special benefits upon identifiable recipients "above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service." The circular states, for example, that a charge should be imposed where a government service "[p]rovides business stability or assures public confidence in the business activity of the beneficiary (*e.g.*, certificates of necessity and convenience for airline routes, or safety inspections of crafts) * * *." The circular also provides that:

> No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

Pursuant to Title V and the Bureau of the Budget Circular, the Federal Power Commission in 1966 established a schedule of filing fees under the Natural Gas Act. Order Nos. 317 and 317-A, 35 FPC 30, 31 Fed. Reg. 431, 4890. Subsequent to the adoption of these fees, congressional appropriations committees recommended that federal agencies review their fee schedules with a view to making increases or adjustments to offset in part the increasing amounts which had to be appropriated by Congress to cover the operating costs of the agencies. S. Rep. No. 1375, 90th Cong., 2d Sess., p. 3; H. Rep. No. 1348, 90th Cong., 2d Sess., p. 4. And in 1970, the chairman of a House appropriations sub-

committee specifically requested the Federal Power Commission to review its fees, and urged the Commission to assess sufficient charges against natural gas companies and utilities subject to its jurisdiction to sustain its administrative operations. The chairman noted with approval the proposed increased fees which had recently been announced by the Federal Communications Commission.[3] Those fees were subsequently adopted by the FCC (23 FCC 2d 880, 35 Fed. Reg. 10988) and upheld by the Fifth Circuit. *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313 (reproduced in App. G, *infra,* pp. 63a-81a), petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States, et al.*, No. 72-948.

B. PROCEEDINGS BEFORE THE COMMISSION

Following an extensive review of its existing fee structure and its administrative operations, the Commission proposed (1) to increase the filing fees under the Natural Gas Act, (2) to establish filing fees for applications under Parts II and III of the Federal Power Act, and (3) to recoup a portion of the remaining costs of its regulatory programs under both Acts through annual assessments. Notice of Proposed Rulemaking, Docket No. R-408, issued November 25, 1970, 35 Fed. Reg. 18324. Following the receipt of comments by sixty-four parties, the Commission issued Order No.

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[3] Hearings before a Subcommittee of the House Committee on Appropriations, 91st Cong., 2d Sess., on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, part 2, p. 951.

427, adopting the proposed fees with several modifications (App. D, *infra*, pp. 18a-50a).

Under the Commission's order, annual charges[4] are assessed as follows: With respect to electric utilities, the Commission determines each year the costs of administering Parts II and III of the Federal Power Act other than those costs associated with the Commission's efforts to promote the coordination and reliability of electric systems. The Commission then deducts from the administration costs the costs associated with services rendered to electric systems not subject to the Commission's jurisdiction and the amounts received during the year from filing fees. The remaining balance is assessed against jurisdictional utilities in proportion to their wholesale sales and interchanges of electric energy. The costs of administering the Commission's reliability and coordination programs, after deducting the portion of the costs attributable to nonjurisdictional utilities, are assessed against jurisdictional utilities in proportion to their gross revenues (App. D, *infra*, pp. 37a-38a).

With respect to natural gas companies, the Commission determines each year the costs of administering the Commission's natural gas pipeline programs under the Natural Gas Act. These costs, after deducting the amounts received from filing fees, are assessed against all natural gas companies with annual operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. In ad-

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[4] Only the portion of the Commission's order establishing annual charges was set aside by the court below. The new filing fees were not challenged and are now in effect.

dition, all natural gas companies required to file an annual report on their total gas supply on FPC Form No. 15 (see 18 C.F.R. 260.7) are assessed one-tenth of a mill for each thousand cubic feet of new reserves of natural gas certified each year (App. D, *infra*, pp. 45a-46a).

In its order establishing the annual charges, the Commission identified the benefits accruing to utilities and natural gas companies from the administration of Parts II and III of the Federal Power Act and the Natural Gas Act. With respect to electric utilities, the Commission referred to the impact of its coordination and reliability programs on the stability and operations of the electric industry (App. D, *infra*, p. 20a). With respect to both electric utilities and natural gas companies, the Commission noted that federal regulation had provided "the foundation for the sound financial condition which public utilities and natural gas companies have achieved" (*id.* at 30a).[5] The Commission referred, in particular, to the "industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system" (*id.* at 30a, n.5). See 16 U.S.C. 825; 15 U.S.C. 717g. The Commission recognized, of course, that its regulatory activities provide continuing benefits to consumers, but also noted that its actions

> * * * have redounded to the benefit of both indus-

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[5] The Commission pointed out that the extension of its jurisdiction in 1935 to electric utilities "was prompted in substantial part by the deplorable practices of management which resulted in the collapse of the financial structures upon which the electric utility industry had been erected" (App. D, *infra*, p. 30a).

> tries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. [App. D, *infra*, p. 31a.]

In its order denying rehearing, the Commission again noted that its promotion of the coordination and reliability of the nation's electric systems was "system wide and beneficial" to electric utilities (App. E, *infra*, p. 55a). With respect to natural gas companies, the Commission referred to the direct benefits pipelines receive from the Commission's regulation of the prices producers may charge for interstate sales of natural gas to pipelines. The Commission also identified other of its activities, in connection with the certification of producer sales, that benefited pipelines. The activities mentioned were (*id.* at 57a):

> * * * the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines.

C. THE DECISION BELOW

On petitions for review, the court of appeals set aside the portion of the Commission's order establishing annual charges, holding that the charges were not au-

thorized by Title V of the Independent Offices Appropriations Act, 1952, or Bureau of the Budget Circular No. A-25 (App. A, *infra*, pp. 1a-13a). In the court's view, the favorable "economic climate" resulting from federal regulation was not a benefit for which a charge could be made, since it was not a special service rendered to a special beneficiary (*id.* at 9a). The court concluded that the regulation of the electric and natural gas industries is "primarily for the benefit of the public" and that "[t]here is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public" (*id.* at 9a-10a).

REASONS FOR GRANTING THE WRIT

The decision below improperly restricts the authority of federal agencies under Title V of the Independent Offices Appropriations Act, 1952, 31 U.S.C. 483a, to recoup a portion of their administrative costs from the companies they regulate. In its holding that annual charges for regulating activities which benefit an entire industry may not be imposed, the decision below would severely limit the ability of federal agencies to carry out the congressional mandate to make their operations "self-sustaining to the full extent possible." 31 U.S.C. 483.[6] Moreover, the approach of the court below con-

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[6] As we have noted (pp. 6-7, *supra*), congressional appropriations committees since the enactment of Title V have urged federal agencies in general and the Federal Power Commission in particular to revise their fee and charges schedules to recoup more nearly the costs of administering their programs. The Commission's annual charges here under review were noted with approval by the chair-

flicts with the approach of the Fifth Circuit in upholding the annual assessments imposed by the Federal Communications Commission. *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313 (reproduced in App. G, *infra,* pp. 63a-81a), petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States, et al.,* No. 72-948. Accordingly, review of the decision below by this Court is warranted to resolve an important question of federal law and to remove the uncertainty which now exists over the extent of the authority of federal agencies under Title V to establish fees and annual charges.

1. Under Title V, federal agencies are authorized to prescribe fees or charges for "any work, service * * *, benefit, privilege, * * * or similar thing of value or utility" performed or provided for "any person." Nothing in the statute suggests that where regulatory activity benefits an entire industry, the costs of providing those benefits to regulated companies cannot be ap-

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man of a House appropriations subcommittee during hearings on appropriations for 1972:

> At this point, Mr. Chairman [Nassikas of the Federal Power Commission], may I state that over the years the Independent Offices Subcommittee on which I served, has urged not only the Federal Power Commission, but the Federal Communications Commission, the Securities and Exchange Commission and others to revise their rate schedules. Many of them have done that. * * * I think the FPC is doing a good job. They have raised their fee rate schedule to $17 million from $7 million and your revised estimate for 1972 is $18,850,000. This will approach putting the FPC on a self-sustaining basis.

Hearings before a Subcommittee of the House Committee on Appropriations, 92d Cong., 1st Sess., on Public Works for Water and Power Development and Atomic Energy Commission Appropriation Bill, 1972, Part 3, pp. 1164-1165.

portioned among those companies. Nor does the reference in Bureau of the Budget Circular No. A-25 to an "identifiable recipient" (App. F, *infra*, p. 61a) foreclose agencies from charging for industry-wide benefits. For example, there is nothing obscure about the identification of the recipients of the regulatory benefits described by the Commission in its order in this case; each public utility and each natural gas company are recipients. Accordingly, the court below erred in holding that the Commission could not impose charges for benefits bestowed on the electric power and natural gas industries.

Title V also provides that all fees and charges should be fair and equitable taking into account "direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." Nothing in this language suggests that charges may not be imposed merely because regulation benefits the public in addition to members of the regulated industry; it is axiomatic that all federal regulation is ultimately for the benefit of the public.

In finding that the Commission's annual charges were unauthorized by Title V, the court below relied (App. A, *infra*, pp. 8a-9a) on the statement in the Bureau of the Budget circular that no charges should be made for regulatory services that can be "primarily considered as benefitting broadly the general public" (App. F, *infra*, p. 62a). But this statement must be read in conjunction with the earlier statement in the circular that charges should be imposed for benefits to identifiable recipients "above and beyond those which accrue to the public at large" (*id.* at 61a). The appro-

priate test under the statute and under the circular is not whether the public benefits from regulatory activities, but "whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by" the federal agency. *Clay Broadcasting Corp.* v. *United States, supra* (App. G, *infra*, p. 79a).

The Federal Power Commission's order establishing annual charges identifies specific benefits accruing to electric utilities and natural gas companies from Commission regulation different from those which accrue to the public at large (see pp. 9-10, *supra*).[7] The Commission's establishment of a uniform accounting system, for example, while ultimately benefiting the public, has made possible the rapid growth of the electric power and natural gas industries. As one writer has noted (Priest, 1 *Principles of Public Utility Regulation* 39 (1969)):

> It must now be said, as a matter of hindsight, that the stringent accounting regulation enforced by the FPC was not only in the public interest, but also in the best interests of the operating companies concerned. What had been dubious items—at least in the light of the new morality—were eliminated from books of account and capital structures became clean, trim and sound. It is questionable

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[7] *Cf. Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, where the Court pointed out the conflicting interests investors and consumers have in the ratemaking process and impliedly recognized that rate regulation can benefit both regulated companies and the general public.

whether the electric utility industry would have been able to raise the more than fifty billion dollars which it has required for postwar expansion if these accounting reforms had not been made.

In short, the court below took an unduly narrow view of Title V of the Independent Offices Appropriations Act, 1952, in prohibiting the Commission from assessing annual charges in return for substantial and tangible benefits bestowed on the members of the regulated industries through the Commission's economic regulatory activities.

2. In *Clay Broadcasting Corp.* v. *United States, supra,* the Fifth Circuit upheld a schedule of fees and annual assessments, applicable to radio and television broadcasters and cable television ("CATV") operators, adopted by the Federal Communications Commission under Title V. The court noted that both broadcasters and CATV systems receive benefits from FCC regulation. Broadcasters receive the right to operate on a portion of the public's electromagnetic spectrum, are protected against technical interference and are part of a FCC controlled market structure which permits them to operate at a profit (App. G, *infra,* p. 70a). CATV operators, of course, use the broadcast signals protected and licensed by the FCC and the relative scarcity of television outlets creates much of the economic value of CATV systems; the systems are also benefited by FCC rules restricting the ownership of CATV systems by television stations and networks and stand to benefit from proposed rules which would limit

the amount of franchise fees which local governments could charge CATV operators (*id.* at 78a-79a).[*]

The nature of the FCC's regulation of the broadcast and CATV industries is sufficiently different from the nature of the Federal Power Commission's regulation of the electric power and natural gas industries to make detailed comparison of the respective benefits bestowed by the different regulatory agencies difficult; *Clay Broadcasting* and the decision below are thus distinguishable on their facts. The approaches of the two courts in applying Title V, however, are diametrically opposed. The court below struck down annual charges on the grounds that only industry-wide benefits are conferred and that the public is the principal beneficiary of the Federal Power Commission's regulatory activities; the Fifth Circuit, on the other hand, gave full recognition to industry-wide benefits as a foundation for charges under Title V and held that charges could be imposed where members of an industry benefit from regulation "in a manner different from the public at large" (App. G, *infra*, p. 79a). In our view, the Fifth Circuit adopted the correct legal standard.

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[*] The petition for a writ of certiorari of the National Cable Television Association (No. 72-948) challenges only the portion of the Fifth Circuit's decision which upheld the FCC's assessment of annual charges against CATV operators.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1973.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1439

NEW ENGLAND POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 71-1539

INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 71-1555

TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petitions for Review of Order of the Federal Power Commission

Decided August 15, 1972

Before TAMM, ROBB and WILKEY, *Circuit Judges.*

TAMM, *Circuit Judge*: In this case several representatives of the natural gas pipeline and electric industry petition the court to review and set aside Federal Power Commission Order No. 427 revising existing fee schedules for filing applications under the Natural Gas Act and Federal Power Act and assessing annually the costs of administering these programs against jurisdictional companies in accordance with formulae set forth in the order. Petitioners attack both the Commission's authority to impose the fees in question and the methods employed by the Commission in allocating the fees and charges. Since it is our view that the Commission lacked statutory authority to act, we pretermit consideration of the latter issue and accordingly grant petitioners the relief they seek.

I. *The Order*

On March 18, 1971, the Commission issued Order No. 427, which (a) revised a schedule of filing fees originally promulgated in a 1966 rulemaking proceeding [1] for certain applications by natural gas companies pur-

[1] Order No. 317, 35 F.P.C. 30. The 1966 order stated that applications seeking specific authorizations required by the Natural Gas Act must be accompanied by a nominal $50 filing fee. Furthermore, fees were imposed for pipeline applications for certificates of public convenience and necessity based upon the higher of the estimated or actual cost of particular pipeline projects.

suant to the Natural Gas Act;[2] (b) established for the first time a schedule of filing fees for various applications and rate schedule filings made by electric utilities pursuant to Parts II and III of the Federal Power Act;[3] and (c) established, also for the first time, a system whereby the costs of administering Parts II and III of the Federal Power Act and the Natural Gas Act, not met by filing fees, will be annually assessed against jurisdictional companies in accordance with formulae set forth in the order. Petitioners do not complain of the increased filing fees under the Natural Gas Act nor of the new fees under the Federal Power Act, but, rather, the nub of their complaint goes to the annual charges assessed. We therefore must examine them in greater detail.

The Commission imposed two types of annual charges upon pipeline companies. The first type, denominated an "annual general charge," imposed only upon Class A and Class B pipeline companies,[4] is computed as follows: Initially, the Commission determines the cost of administering its pipeline programs, subtracting therefrom the revenues derived from its first flat filing and pipeline certificate fees. The resultant net cost is recorded against a particular Class A or B pipeline

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[2] 15 U.S.C. § 717 (1970) *et seq.*

[3] 16 U.S.C. § 824 (1970) *et seq.*

[4] Interstate natural gas pipeline companies are classified for accounting and reporting purposes in the Commission's Uniform System of Accounts according to the amount of their annual gas operating revenues as follows:

Class A—$2,500,000 or more
Class B—$1,000,000 to $2,500,000
Class C—$150,000 to $1,000,000
Class D—$25,000 to $150,000

based upon the ratio of it total jurisdictional gas deliveries to the total jurisdictional gas deliveries of all Class A and B pipelines. The second annual charge, denominated the "annual reserves added assessment," is imposed upon pipeline companies required to file an Annual Report—Total Gas Supply on FPC Form No. 15. The assessment is one-tenth of a mill for each Mcf of the new reserves certificated for a particular calendar year as shown on that particular pipeline's Form No. 15.

The annual charge imposed upon jurisdictional electric utilities is computed as follows: A determination is made for each year of the administration costs of the Commission's public utility regulatory programs (other than those associated with coordination and reliability) from which is deducted the costs associated with services rendered to or for the benefit of electric systems which are not public utilities as defined in the Federal Power Act and the amounts received during the same period as filing fees. The "adjusted cost" is then assessed against each public utility in the proportion that the sum of the gross jurisdictional kilowatt hours it sells at wholesale and those it delivers under interchange power agreements bears to the sum of the gross jurisdictional sales by all public utilities. Furthermore, a determination is made of the Commisson's cost of administration associated with its coordination and reliability programs which is then assessed against each public utility in the proportion that the gross revenues of such company bears to the sum of the gross electric revenues of all public utilities.

The authority upon which the Commission relied in its order assessing the foregoing annual charges and

fees was Title V of the Independent Offices Appropriation Act of 1952.[5] In addition, the Commission now asserts before this court for the first time that it also bases its authority to act upon Section 16 of the Natural Gas Act[6] and Section 309 of the Federal Power Act.[7] We now turn to an examination of these statutes, the appropriate legislative history, the relevant administrative interpretations, and comparable statutes.

II. *Title V of the Independent Offices Appropriation Act of 1952*

A. *The Statute*

The Commission primarily bases its authority to impose the annual general charge upon Title V of the Independent Offices Appropriation Act of 1952, which provides in pertinent part:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefore such fee, charge, or price, if any, as he shall determine to be fair and equitable

[5] 65 Stat. 290, 31 U.S.C. § 483a (1970).

[6] 15 U.S.C. § 717o (1970).

[7] 16 U.S.C. § 825h (1970).

taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . .

The legislative history behind this proviso, a "rider" to the appropriations bill, is sparse, but its purpose was made quite clear by the Report of the House Committee on Appropriations which we now set forth:*

> The Committee is concerned that the Government is not receiving full return from many of *the services which it renders to special beneficiaries.* Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and other related considerations.
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> . . . .
>
> The bill would provide authority for Government agencies to make charges for these services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. (Emphasis supplied).

As the foregoing legislative history makes clear,

* H.R. Rep. No. 384, 82nd Cong., 1st Sess. 2-3 (1952).

Title V was enacted to allow the agency to recoup costs from identifiable "special beneficiaries" where the services rendered inured to the benefit of special recipients not the general public. The statute has been consistently interpreted in this manner by the agencies of the executive branch of Government.*

B. *Agency Interpretation of Title V*

1. *Budget Circular No. A-25*

The standards and guidelines for application of Title V have been set forth by the Bureau of the Budget (now Office of Management and Budget) in Budget Circular No. A-25 of September 23, 1959, wherein the Bureau stated that a reasonable charge "should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit." These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . . . For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insur-

* Petitioners rely upon Aeronautical Radio, Inc. v. United States, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965), where the court upheld nominal filing fees upon certain types of radio license applications. However, in that case, unlike the instant one, the court was dealing with specific applications submitted to the Commission which conferred specific benefits upon the applicant.

ance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours)."

However, the Circular states no charge should be levied for services rendered "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public."

The Commission urges that the annual charge comes within the terms of Circular No. A-25 because the charge relates to the cost incurred in discharging its "responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial" and although such regulation "has provided continuing benefits to consumers," it has also

redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities

required for capital additions to meet ever-increasing demands.

The Commission has, however, missed the point. The creation of an "economic climate" is not a special service nor is a particular pipeline or gas company the "special beneficiary" of such a climate any more than any other pipeline, gas company or the consumer in general. Indeed, under the Commission's order petitioners would be liable for the annual assessment despite the fact that they had no proceedings before the Commission for that year. In effect then, the contemplated charges would have no relation to specific services or benefits rendered. The Commission must then fall back upon its "economic climate" argument which is obviously an overly broad benefit particularly in light of the requirement that the charges be for a "measurable unit of service." Furthermore, the statutory language—"to or for any person"—as well as the Budget Circular require an identifiable recipient. The Commission's inadequate response that the identifiable recipient is the whole industry assumes that each company receives a benefit directly proportional to revenue. This assumption is erroneous in that in any given year some companies may require substantial services from the Commission while others may neither require nor desire them.

In sum, we conclude that the regulation of these industries is primarily for the benefit of the public. Their charter statutes require them to so act. The courts have so held.[10] There is something fundamen-

[10] *See* Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388-89 (1959); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 610-12 (1944).

tally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here.

2. *Federal Power Commission Order 317*

In Order 317, the original fee schedule imposed in 1966,[11] the Commission espoused a position precisely opposite from that which it now espouses, concluding that the charges at issue were general, and therefore without statutory foundation. We wholeheartedly concur in the Commission's earlier observation contained in the Notice of Proposed Rulemaking wherein the Commission stated:

> The Commission has reviewed its functions under . . . the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under . . . the . . . rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies.[12]

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[11] *See* note 1, *supra*.

[12] 30 Fed. Reg. 12077 (September 15, 1965).

III. *Section 16 of the Natural Gas Act & Section 309 of the Federal Power Act.*

The Commission asserts for the first time on appeal that it relies upon Section 16 of the Natural Gas Act [13] and Section 309 of the Federal Power Act [14] as au-

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[13] The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

15 U.S.C. § 717o (1970).

[14] The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, and information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall

thority for Order 427.[15] Although we view this as "*post hoc* patchwork,"[16] we have considered and rejected the argument. Both sections are of an implementary rather than substantive character. The cases have made abundantly clear that while these provisions must be read in a broad expansive manner, they can only be implemented "consistently with the provisions and purposes of the legislation,"[17] and "that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the act."[18] These sections merely augment existing powers conferred upon the

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be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

16 U.S.C. § 825h (1970).

[15] The Commission's order does mention sections 16 and 309, however, not as substantive authority to prescribe fees, but merely as a point of reference to the source of the Commission's power to issue regulations implementing the basic grant of authority to charge the fees cataloged in Title V.

[16] Braniff Airways, Inc. v. Civil Aeronautics Board, 126 U.S.App. D.C. 399, 411, 379 F.2d 453, 465 (1967).

[17] Public Service Commission of New York v. Federal Power Commission, 117 U.S.App.D.C. 195, 198-99, 327 F.2d 893, 896-97 (1964).

[18] Niagara Mohawk Power Corp. v. Federal Power Commission, 126 U.S.App.D.C. 376, 381, 379 F.2d 153, 158 (1967) (footnote omitted).

agency by Congress,[19] they do not confer independent authority to act.

IV. *Comparable Statutes*

Putting aside Title V as authority for the order, it is highly significant that neither the Natural Gas Act nor Parts II or III of the Federal Power Act impose fees upon companies for regulation costs while Section 10(e) of the Federal Power Act explicity requires licensees thereunder to pay annual charges "fixed by the Commission for the purpose of reimbursing the United States for the costs of administ[ering]" Part I of the Act.[20] The Congress could have, but did not set forth a provision similar to section 10(e) in the statutory sections here under review. Furthermore, many states have adopted statutes which authorize the local regulatory agency to recover from companies subject to their regulation the costs of administration either on a fixed-fee basis for specific services or as a percentage of some measure of size or value.[21] While it is clear that legislatures have the authority to so act, it is equally clear that Congress failed to do so here.

V. *Conclusion*

For the foregoing reason the order of the Commission under review is set aside with respect to the annual charges levied against petitioners.

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[19] *See also* Mesa Petroleum Corp. v. Federal Power Commission, 441 F.2d 182 (5th Cir. 1971).

[20] 16 U.S.C. § 803(e) (1970). *See also* 16 U.S.C. § 803(f) (1970).

[21] Subcomm. on Intergovernmental Relations of the Senate Comm. on Operations, 90th Cong. 1st Sess., State Utility Commissions 22 (Comm. Print September 11, 1967).

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

No. 71-1439

New England Power Company, Petitioner

v.

Federal Power Commission, Respondent

No. 71-1539

Independent Natural Gas Association of America, Petitioner

v.

Federal Power Commission, Respondent

No. 71-1555

Tennessee Gas Pipeline Company, Petitioner

v.

Federal Power Commission, Respondent

PETITION FOR REVIEW OF ORDER OF THE FEDERAL POWER COMMISSION

Before:
TAMM, ROBB, and WILKEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the Commission under review is set aside with respect to the annual charges levied against petitioners, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:
Hugh E. Kline
Chief Deputy Clerk

Dated: August 15, 1972
Opinion by Circuit Judge Tamm

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

No. 71-1439

New England Power Company,
Petitioner

v.

Federal Power Commission, Respondent

No. 71-1539

Independent Natural Gas Association
of America, Petitioner

v.

Federal Power Commission, Respondent

No. 71-1555

Tennessee Gas Pipeline Company,
A Division of Tenneco Inc.,
Petitioner

v.

Federal Power Commission, Respondent

Before: Tamm, Robb and Wilkey, Circuit Judges.

ORDER

On consideration of respondent's petition for rehearing, it is

ORDERED by the Court that respondent's aforesaid petition is denied.

Filed: September 25, 1972.

Per Curiam
For the Court:

HUGH E. KLINE
Clerk

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[18 CFR, Parts 3, 11, 32, 33, 34, 35, 36, 45 and 159]

Before Commissioners: John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr.,
John A. Carver, Jr., and
Albert B. Brooke, Jr.

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	Docket No. R-408

ORDER NO. 427

ORDER AMENDING PART 3 — GENERAL POLICY AND INTERPRETATIONS, AMENDING PARTS 11, 32, 33, 34, 35 AND 45, AND ADDING PART 36 — REGULATIONS UNDER THE FEDERAL POWER ACT — AND AMENDING PART 159 — REGULATIONS UNDER THE NATURAL GAS ACT

(Issued March 18, 1971)

On November 25, 1970, the Commission issued a Notice of Proposed Rulemaking in this proceeding (35 F.R. 18324, December 2, 1970) proposing to amend its general rules and regulations under the Federal

Power Act and the Natural Gas Act to revise the schedules of fees at present imposed in connection with the filing of certain applications by natural gas companies and to establish new schedules of fees and annual charges to be applicable to electric utility companies and natural gas companies.

Responses were received (exclusive of requests for additional time within which to submit comments [1]) on behalf of 62 [2] companies and two industry associations raising questions as to the meaning of certain provisions, suggesting modifications for clarification or on the merits, objecting to the amounts proposed for certain of the services in the noticed schedules of fees and generally questioning the propriety of imposing annual assessments for services rendered in the administration of both Acts or the basis upon which they would be computed. A number of these comments have provided the basis for clarifying this rulemaking and others which have been called to our attention have resulted in revisions incorporating recommendations that will avoid inequities that might otherwise have occurred. The remaining comments and recommendations were considered and those which have been found lacking in merit or not necessary are not discussed in the order herein adopted.

Section 36.1 as proposed clearly stated the Commis-

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[1] The notice invited the submission of data, views, comments and suggestions in writing by no later than December 18, 1970; however, by notices issued December 16, 1970 (35 F.R. 19641, December 25, 1970) and January 22, 1971 (36 F.R. 1487, January 30, 1971), the time to do so was extended ultimately to February 5, 1971.

[2] Those responding to the invitation for comments are listed in an appendix attached hereto.

sion's aim that annual assessments covering the balance of the expenses incurred in the administration in each fiscal year of Parts II and III of the Federal Power Act above those recovered by the proposed fees for specified filings be based on gross electric revenues. We proposed that the allocations be based on gross rather than jurisdictional (electric) revenues because of the benefits deriving from our services (both regulatory and involving reliability) since both have direct and substantial impact on the stability and operations of public utilities regardless of the amount of their revenues derived from jurisdictional sales. However, we recognize the jurisdictional sales for resale of many public utilities are relatively small compared to their total revenues and that inequities would result if assessments covering all programs under Parts II and III of the Federal Power Act were based entirely on gross revenues. Accordingly, we have revised this section to provide that the residual costs of administration of our regulatory programs should be allocated on the basis of jurisdictional business but that the costs relating to our coordination and reliability programs which have impact on the total business of the utilities, whether or not jurisdictional, should be allocated on the basis of gross revenues. For the reason above stated, similar revision has been made in Section 159.2a regarding the allocation of assessments among natural gas companies. As revised such companies will be required to pay annual charges covering the residual costs of those programs on the basis of their jurisdictional business whether stemming from sales for resale, transportation of natural gas for others, or both. Other changes in Sections 36.1 and 159.2a have been

made for purposes of clarification based on the numerous comments we have received.

We have adopted suggestions that the fees prescribed in connection with the merger or consolidation of facilities be based on a sliding scale instead of a fixed fee. Our design of the fee schedule contemplated a charge of $10,000 for mergers of Class A, Class B utilities or both Class A and B utilities; the mere acquisition of facilities not constituting a merger or consolidation of such utilities, such as the acquisition of a transmission line having a value in excess of $50,000, would have been covered under Section 36.2 (c), as proposed, involving a fee of $500. But this amount would have been payable not only by the applicant disposing of the property but also by the one acquiring it. Instead, we are removing possible ambiguity and providing a more equitable schedule by requiring payment of a fee, not to exceed $10,000, based on the value of property transferred, as has been proposed. We are also adopting the suggestion that the requisite fee payable upon the filing of applications for the acquisition and disposition of facilities which involve several jurisdictional utilities should be split among them on the theory both the acquiring and disposing utility derive benefit from the transaction. In order to avoid any imposition of charges upon non-jurisdictional companies, however, the charges applicable to jurisdictional companies shall be at the rate of 1/2 percent of the value of facilities acquired and disposed of but not exceeding $5,000 as to each. A non-jurisdictional company acquiring facilities from or disposing of assets to a jurisdictional company will neither be charged nor

the costs of such services be borne by the utilities subject to our jurisdiction.

Some filings for rate increases are very small. In such cases a fee of $500 would be inequitable. However, administrative analysis is required regardless of the amount of the increase and it is conceded that a reasonable fee should be imposed for these services. We have accordingly revised proposed Section 36.2 (g) to provide for payment of a flat fee of $100 for increases of less than $5,000, if in sum they constitute no more than one percent of the total charges then in effect with respect to the purchasers affected by such filing. The second requirement is based on our experience that a rate increase though small will necessitate a more thorough evaluation if it constitutes more than a very minor part of the total charges to the customers involved. Where both requirements for the minimum fee are not met, the filing fee will remain at $500 which will also apply to increases from $5,000 to $50,000. Objections to a scaled fee for increases of $50,000 or more are not well taken, since generally our input of services varies directly with the amount of the increases we are required to review. These changes have been made in Section 36.2 (g).

The suggestion that filings for rate increases made under multi-party agreements involving several utilities should be exempt from fee requirements is without merit. The Commission's staff is obligated to evaluate such agreements where filing is required and if they involve rate increases Commission services should not be rendered without charge.

Several responding parties suggested the incorpora-

tion of provisions for refunds of various dimensions. The underlying purpose in adopting these fee schedules is to provide for the recoupment to the Treasury for the value of services rendered. Applications which may ultimately be denied in whole or in part after staff review and analysis involve the services of the Commission which should be subject to fee charges within the intent of our underlying authority. There is no valid basis for refund in those circumstances. Similarly, the payment of a fee based upon a filing of a rate increase which is ultimately found or conceded to be excessive should not justify a partial refund.

We adopt the suggestion that if an application or filing is withdrawn or rejected as insufficient or for some other reason not involving the input of substantial staff services, the fee should be refunded. If rejection occurs after considerable expenditure of staff time, there is no justification for refund. Accordingly, we have provided for refund in those cases if the filing has been withdrawn or found deficient and rejected. Under our procedures rejection must occur within 30 or 60 days depending on the type of filing; in that time staff effort will not have been cumulatively large. We have also clarified the status of amended filings in regard to fee requirements and filings for which more than one fee might be payable under these regulations. See Section 36.3.

Two recurrent objections to the proposed regulations require comment. The first, that the Commission does not have authority to charge fees except for and to the extent of the actual cost of specific services rendered has already been considered and was covered by our

discussion in the notice of rulemaking issued in this docket. Congress has by statute vested authority in all agencies of the federal government to prescribe fees or charges for services conferring benefits on persons subject to their jurisdiction so as to render such agencies as fully self-sustaining as possible. The pertinent provision which is included in Title V of the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 USC 483a), reads as follows:

> It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy

or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

Pursuant to such statute and to recommendations made at hearings before Congressional appropriation committees, we established by order our first schedule of fees (apart from those under Part I of the Federal Power Act) which were payable in connection with applications filed by natural gas pipeline companies for certificates of public convenience and necessity and for other authorizations as especially beneficial to the recipients of the services rendered in their processing. Order 317, 31 F.R. 430, January 13, 1966, as amended by FPC Order 317-A, 31 F.R. 4890, March 24, 1966, Part 159 of the Commission's Regulations Under the Natural Gas Act, 18 CFR, Part 159.

Congressional appropriation committees have since requested further review of our fee schedules with a view to making increases or adjustments to offset in part the increasing needs for direct appropriations for agency operating expenses. S. Rept. No. 1375, 90th

Cong., 2d Sess.; H. Rept. No. 1348, 90th Cong., 2d Sess. More recently, the Chairman of the Subcommittee on Independent Offices and Department of Housing and Urban Development of the Committee on Appropriations of the House of Representatives requested us to review our rate and fee structures with a view to charging gas and utility companies enough to sustain our administrative operations. Hearings, Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., Part 2, p. 951.

Moreover, we noted that in developing these schedules we have endeavored to adhere to the guidelines contained in Budget Circular No. A-25 by the imposition of charges "to each identifiable recipient for a measurable unit or amount of Government service . . . from which he derives a special benefit." These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . ." or provides "more immediate or substantial gains or values . . . than those which accrue to the general public . . ." or provides business stability or assures public confidence in the business activity of the beneficiary . . ." or is "performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public . . .".

Costs directly allocable to a specific type of service rendered to specifically identifiable persons would be effected by charges directly related to that specific service. In determining the amount thereof we are not required to keep cost records on a case-by-case basis

but are authorized to average the costs involved in a particular service. *Aeronautical Radio, Inc.* v. *United States*, 335 F.2d 304 (CA7, 1964), certiorari denied, 379 U.S. 966 (1965). Our remaining proposed charges being of benefit overall to the members of both industries would be assessed on a measure of size against those within the ambit of our jurisdictional activities. We deem the allocation formulas we adopt herein to be both reasonable and a practical alternative to the development of a complex, extensive and costly accounting system whereby actual costs involved in each matter would be charged to the parties involved. Even such a system for basing charges would not in all circumstances be equitable since policies developed in prolonged proceedings involving one utility often become applicable to others at a minimum of additional administrative cost. We do not, after considering the content of the responses in this respect, find the comments sufficiently persuasive to require a change in the schedules for annual fees proposed and adopted herein.

We reject the contention that the proposed fees would constitute an illegal imposition of a tax inasmuch as we hold that the proposed charges constitute fees rather than taxes. The distinction between a tax and a fee has been clearly defined by the courts. The cases hold that:

A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered. *United States* v. *Butler*, 297 U.S. 1, 61 (1936); *Gumby* v. *Yates*, 214 Ga. 17, 102 S.E.2d 548,

550-551 (1958). A fee is a charge fixed by law for services of public officers or for use of a privilege under control of the government. *Fort Smith Gas Co.* v. *Wiseman,* 189 Ark. 675, 74 S.W. 2d 789, 790 (1934). A tax is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society. *Stewart* v. *Verde River Irrigation & Power Dist.* 49 Ariz. 531, 68 P. 2d 329, 334, 335.

While it may possibly be argued that the provision of Title V calling for the payment of the amounts collected in fees into the Treasury as miscellaneous receipts is descriptive of a tax, we believe that an overall reading of Title V firmly supports the contention that the fees are not intended for the support of the government as a whole, but rather as a means of sustaining to the fullest extent feasible those agencies of the government which bestow special privileges and services upon certain individuals who may apply for those privileges and services.

The question whether the proposed schedules constitute a tax is not affected by the method used in their assessment, i.e., whether in fixed amounts or varying in accordance with specified formulae. The proposed

charges were not authorized to impose exactions in the support of government in the general understanding of the term "tax", *United States* v. *Butler*, 297 U.S. 1, 61; *New Jersey Bell Telephone Co.* v. *State Board of Taxes*, 280 U.S. 338, 347, but would be in the nature of impositions "levied to reimburse the state or a subdivision thereof for services rendered rather than to provide public revenue . . ." 51 Am. Jur., Taxation § 20.[3]

The second objection made by a number of the responding parties is to the amounts projected to be recovered under the proposed fee schedules. In essence, those who have raised this contention state that the benefits of regulation should be borne in part by those who also benefit from the services rendered by the administration of both Acts who are not subject to regulation. These comments have merit. While we do not exercise jurisdiction over REA or municipally operated utilities, they do derive benefits from the services we provide under Parts II and III of the Federal Power Act. In this light it would be inequitable to have the privately owned utilities bear the cost of such services and we have accordingly revised Section 36.1 to reflect this change. (We had already excluded from our formula the costs associated with services rendered to other (including federal) agencies since we have not

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[3] State statutes designed to recover in part the costs of administration of their public service commissions either on a fixed-fee basis for specific services or as a percentage of some measure of size or value are not infrequent. See compilation in Committee Print prepared by the Subcommittee on Intergovernmental Relations of the Senate Committee on Operations, dated September 11, 1967, entitled, State Utility Commissions, 90th Cong., 1st Sess., p. 22.

incorporated in the costs to be assessed our expenses incurred in programs directed to servicing other agencies and the public.)

However, we do not agree that recoupment of part of the costs of all other services rendered to jurisdictional companies should be absorbed by the taxpayers generally since they primarily benefit the public utilities. The extension of the Commission's jurisdiction in 1935 to public utilities was prompted in substantial part by the deplorable practices of management which resulted in the collapse of the financial structures upon which the electric utility industry had been erected. The creation of regulatory agencies at the federal [4] level and the exercise of the powers delegated by the Congress to them have provided the foundation for the sound financial condition which public utilities and natural gas companies have achieved.[5] We recognize that the ex-

[4] Investigation of both the electric and gas industries by the Federal Trade Commission resulted in the grant of regulatory powers over public utilities. See Title II of the Public Utility Holding Company Act of 1935, 49 Stat. 838. Regulation of natural gas companies, though considered at the time that Act was adopted, was not authorized until 1938. 52 Stat. 821.

[5] A report issued by the Commission in 1950 discussed industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system. Typical of the comments made was the following in a publication issued by a prominent member of the New York Stock Exchange:

> "A great measure of the improvement in the financial position of the electric utilities has been due to the strengthening of regulatory controls by the Federal Power Commission, and particularly to the enforcement of the new uniform system of accounts.

A trade publication editorialized that

> "At no time in the past twenty years has the electric utility

ercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial has provided continuing benefit to consumers, but our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. In these circumstances we believe that our proposal which would make our operations as self sustaining as reasonably possible is consistent with statutory directives and is equitable, particularly since the charges involved can ultimately be passed on by these companies to their customers as expense properly includable among items upon which their respective costs of service are based.

The view that the imposition of fees destroys the budgetary restrictions imposed upon agencies like the Federal Power Commission is misplaced since all receipts are payable into the United States Treasury and not available for our use. The Commission's spending power, whether or not such charges are imposed, is predicated on appropriations authorized by the Congress and is dependent solely on the determination of that body as to the funds needed for administration of the powers delegated to us.

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industry of this country been in as sound a position financially as it is today."

Report on the Reclassification and Original Cost of Electric Plant of Public Utilities and Licensees, Federal Power Commission, 1950, pp. 19-20.

These regulations will become effective July 1, 1971. The filing fees will become payable on all applicable filings made after that date and assessments for the costs of administration of the Commission's programs will be made as soon after the close of its fiscal year ending June 30, 1971 as is practicable, except that annual charges relating to the Commission's public utility and natural gas pipeline regulatory programs will be computed and assessed for the first time for the Commission's fiscal year ending June 30, 1972.

The Commission finds:

(1) That the notice and opportunity to participate in this rulemaking proceeding with respect to the matters presently before this Commission through the submission, in writing, of data, views, comments and suggestions in the manner as described above, are consistent and in accordance with all procedural requirements therefor as prescribed in Section 553 of Title 5 of the United States Code.

(2) That the revisions herein made to the amendments proposed in the notice of rulemaking do not impose a further burden on persons subject to these regulations, do not constitute a substantial departure from the original proposal, and are consistent with the prime purpose of this rulemaking; therefore further notice and opportunity for comment is unnecessary.

(3) Upon consideration of all relevant matters presented, including the arguments, contentions, suggestions and other views expressed in the comments received and having determined that a conference to discuss the proposed amendments was not required, we

further find that the amendments to the Commission's regulations adopted herein are necessary and appropriate for carrying out the provisions of the Federal Power Act, the Natural Gas Act, and the Independent Offices Appropriations Act for the Year Ending June 20, 1952.

The Commission, acting pursuant to the provisions of the Federal Power Act, particularly Section 309 (49 Stat. 858, 16 U.S.C. 825h), the Natural Gas Act, particularly Section 16 (52 Stat. 830, 15 U.S.C. 717o), and the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 U.S.C. 483a), *orders:*

(A) Part 3, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended as follows:

1. The title of Part 3 is amended by inserting the words "Miscellaneous Charges," immediately preceding the words "Ethical Standards". As so amended the title of Part 3 reads as follows:

PART 3 — ORGANIZATION: OPERATION: INFORMATION AND REQUESTS; MISCELLANEOUS CHARGES; ETHICAL STANDARDS.

2. Sec. 3.102, Public information, requests, and assistance, is amended by revising the section title and by revising paragraph (b) to read as follows:

§ 3.102 Public information, requests, and assistance; miscellaneous charges.

* * * * *

(b) During the Commission's regular business hours, the public may examine in the Office of Public Information in Washington, D. C., copies of public information filed with the Commission. Photo copies of public material may be obtained through the public reference room. Fees charged for such copies are established by an annual contract between the Commission and a private company which does the work. Current schedules of fees for copying work are available from the Office of Public Information. Except for requests made by government agencies certification of copies of any official Commission record shall be accompanied by a fee of two dollars. Inquiries and orders may be made to that office personally, by telephone, or by mail.

(B) Subchapter B—Regulations under the Federal Power Act, Chapter I, Title 18 of the Code of Federal Regulations is amended as follows:

1. The title of "Part 11—Annual Charges" is revised to read as follows:

PART 11—ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

2. In "Part 32—Interconnection of Facilities; Emergencies; Transmission to Foreign Country.", the section titles and introductory clauses of §§ 32.1 and 32.51 and the introductory sentence of § 32.22 are revised to read as follows:

§ 32.1 Contents of application; filing fee.

Every application under § 202 (b) of the

Act shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall set forth the following information:

* * * * *

§ 32.22 Application for permanent connection for emergency use; contents; form and style; filing fee; number of copies.

Application for Commission approval of a permanent connection for emergency use only shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall conform with the requirements of §§ 32.1 to 32.4, inclusive, and, in addition, shall state in full the reasons why such permanent connection for emergency use is necessary in the public interest.

§ 32.51 Contents of application; filing fee.

Every application shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall set forth in the order indicated, the following:

* * * * *

3. In "Part 33—Application for Sale, Lease, or Other Disposition, Merger or Consolidation of Facilities, or for Purchase or Acquisition of Securities of a Public Utility", the title and introductory clause of § 33.2 are revised to read as follows:

§ 33.2 Contents of application; filing fee.

Each such applicant shall set forth in its application to the Commission, which shall be

accompanied by the fee prescribed in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which should, insofar as possible, be furnished as to said applicant and each company whose facilities or securities are involved:

* * * * *

4. In "Part 34—Application for Authorization of the Issuance of Securities or the Assumption of Liabilities", the title and introductory clause of § 34.2 are revised to read as follows:

34.2 Contents of application; filing fee.

Every such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee prescribed in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which, in the case of the assumption of a liability, shall be furnished as to both the issuer and the person assuming liability:

* * * * *

5. In "Part 35—Filing of Rate Schedules", between the heading "Application" and the section title "§ 35.1 Application; obligation to file rate schedules", a new "§ 35.0 Filing fees", is added which reads as follows:

§ 35.0 Filing fees.

Every filing made under this Part shall be

accompanied by the fee described in Part 36 of this Subchapter.

6. Immediately following Part 35, a new "Part 36—Annual Charges and Fees" is added which reads as follows:

PART 36—ANNUAL CHARGES AND FEES UNDER PARTS II AND III OF THE FEDERAL POWER ACT

§ 36.1 Annual charges.

Reasonable annual charges shall be assessed by the Commission against each public utility to reimburse the United States for such costs of administration of Parts II and III of the Federal Power Act as hereinafter provided:

(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's public utility regulatory programs (other than those associated with coordination and reliability) from which shall be deducted the allocable costs associated with services primarily rendered to or for the benefit of electric systems which are not public utilities as defined in the Federal Power Act and the amounts received during the same period pursuant to the provisions of § 36.2 of this Part. The difference shall constitute the adjusted costs of administration of such programs for such period.

(1) The adjusted costs of administration determined under paragraph (a) of

this section shall be assessed against each public utility in the proportion that the gross jurisdictional kilowatt hours sold and kilowatt hours delivered under interchange power agreements by such public utility in the calendar year terminating in such fiscal period bear to the sum of the gross jurisdictional kilowatt hours sold and kilowatt hours delivered under interchange power agreements by all public utilities for the like period.

(b) A determination shall be made for each fiscal year of the costs of administration of the Commission's coordination and reliability programs from which shall be deducted the allocable costs associated with services primarily rendered to or for the benefit of electric systems which are not public utilities as defined in the Federal Power Act. The difference shall constitute the adjusted costs of administration of such programs for such period.

(1) The adjusted costs of administration determined under paragraph (b) of this section shall be assessed against each public utility in the proportion that the gross electric revenues of such public utility in the calendar year terminating in such fiscal period bear to the sum of the gross electric revenues of all public utilities for the like period.

(c) Annual charges assessed under this

section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

§ 36.2 Filing fees.

A filing fee in the amounts set forth below shall accompany each of the following:

(a) Applications for physical connections $150

(b) Applications for the construction of border facilities $150

(c) Other corporate applications authorized by these regulations under the Federal Power Act $500

The provisions of this paragraph shall not apply to:

(1) applications under Part I of the Federal Power Act which are subject to the fees prescribed in Part 11 of these regulations,

(2) applications for the acquisition by merger or consolidation or the disposition by sale, lease or otherwise of electric facilities which are subject to the fees prescribed in paragraph (d) of this section, and

(3) applications for authority to hold interlocking positions which are subject to the fees prescribed in paragraph (h) of this section.

(d) Applications by a public utility for the acquisition by merger or consolidation, directly or indirectly, of electric facilities

of another person or for disposition by sale, lease or otherwise of electric facilities to another person ..... ½% of the value of such facilities, but not exceeding $5,000

(1) The fee prescribed by paragraph (d) of this section shall be shared by the public utilities acquiring and disposing of such facilities proportionately to the value of such facilities acquired or disposed of; the entire fee shall be paid by a public utility acquiring or disposing of such facilities from or to a person not a public utility.

(e) Nominal rate schedule filings voluntarily filed other than those involving rate increases $100

(1) Examples of such filings include schedule changes having minimal impact on the operations of a public utility such as those providing service to an additional delivery point, changes in maximum obligation to serve, changes in minimum billing demand not affecting billings, changes in service rules or regulations not affecting billings, extensions of terms of contracts or continuation of service, cancellation of rate schedules where service is no longer needed, changes in delivery voltages or metering voltages, changes in contract provisions not affecting

service, rates or billings, and adoption of initial rate schedules containing rates identical to rates applicable to the same customer class previously accepted for filing.

(f) Moderately complex rate schedule filings voluntarily filed $500

(1) Examples of such filings include schedule changes presenting more complex administrative problems such as those involving interconnection agreements, pooling agreements and additional large-scale sales.

(g) Rate schedule filings involving rate increases (computed on an annual basis) in excess of charges for the 12-month period preceding the proposed effective date thereof, as follows:

(1) Nominal rate increases:

(i) Schedule changes involving increases in rates totalling less than $5,000 and one percent of the total charges to the persons to be affected thereby $100

(ii) Schedule changes involving increases in rates totalling less than $5,000 but not subject to the filing fee provided in subdivision (i) of this subparagraph and those involving increases in rates of $5,000 or more but not less than $50,000 ..... $500

(2) Rate increases other than those covered under subparagraph (1) of this paragraph:

(i) One percent of the amount of such increases up to but not exceeding $1 million;

(ii) $10,000 plus ½ percent of the amount of such increases in excess of $1 million and not exceeding $10 million;

(iii) $55,000 plus ¼ percent of the amount of such increases in excess of $10 million.

sitions $100

(h) Applications to hold interlocking positions $100

§ 36.3 Miscellaneous

(a) Annual assessments and fee payments shall be made by check or money order to the Treasurer of the United States. No fees will be refunded unless within sixty days of the filing of an application or rate schedule filing in connection with which such fees have been paid such application or rate schedule filing has been voluntarily withdrawn by the applicant or rejected by the Commission as incomplete or for some other reason.

(b) An application or rate schedule filing submitted for the sole purpose of amending a pending application or rate schedule filing need not be accompanied by a fee in addition to that which accompanied the original submission, provided that if the later application or rate schedule filing would have upon initial filing required payment of a larger fee, such refiling shall be accompanied by an amount equal to the difference between both fees.

(c) Where an application or filing seeks Commission authorization in the alternative or would otherwise be subject to the payment of more than one filing fee, only the highest fee shall be required.

§ 36.4 Accounting for fees paid pursuant to this Part.

A public utility subject to the provisions of this Part shall account for the assessments and fees paid by charging the amounts thereof to Account 928, Regulatory commission expenses.

7. In "Part 45—Application for Authority to Hold Interlocking Positions", the title and introductory clause of § 45.8 are revised to read as follows:

§ 45.8 Contents of application; filing fee.

Each application shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall state the following:

* * * * *

(C) Part 159, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18 of the Code of Federal Regulations is amended as follows:

1. The title of "Part 159—Fees for Certain Applications Filed Pursuant to the Natural Gas Act" is revised to read as follows:

PART 159—FEES AND ANNUAL CHARGES UNDER THE NATURAL GAS ACT

2. In § 159.2 Applications involving construction or acquisition of facilities, paragraphs (a), (b) and (d) are revised to read as follows:

§ 159.2 Applications involving construction or acquisition of facilities.

* * * * *

(a) Within 30 days following issuance of notice of application, an amount equal to 65/1000 of 1 percent (0.00065) of the estimated cost of construction of new facilities or of facilities to be acquired;

(b) Within 30 days following grant of the certificate, an amount equal to 130/1000 of 1 percent (0.00130) of the estimated cost of construction of new facilities or of facilities to be acquired, unless applicant does not accept the certificate.

* * * * *

(d) If the actual cost of construction of new facilities or of facilities to be acquired exceeds the estimated cost thereof, the statement of actual cost, required to be submitted by § 157.20(c)(4) and (d)(3) of this chapter, shall be accompanied by an amount equal to 195/1000 of 1 percent (0.00195) of the excess of actual cost (plus estimated cost of facilities for which actual cost is not then recorded on the books of applicant) above estimated cost.

* * * * * *

3. Immediately following § 159.2, a new "§ 159.2a Annual charges" is inserted which reads as follows:

§ 159.2a Annual charges.

Reasonable annual charges will be assessed by the Commission against natural gas companies to reimburse the United States for costs of administration of the Natural Gas Act, as hereinafter provided:

(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's natural gas pipeline programs from which shall be deducted the amounts received during the same period pursuant to the provisions of §§ 159.1 and 159.2 of this Part. The difference shall constitute the adjusted costs of administration of such programs for such period.

(1) The adjusted costs of administration determined under paragraph (a) of this section shall be assessed against each Class A and Class B natural gas company in the proportion that the total jurisdictional gas deliveries of such natural gas company in the calendar year terminating in such fiscal period bear to the sum of the jurisdictional gas deliveries of all Class A and Class B natural gas companies for the like period.

(b) In addition to the annual charges prescribed by paragraph (a) of this section, each natural gas company required to file an An-

nual Report—Total Gas Supply on FPC Form No. 15 shall be assessed one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form.

(c) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

4. In "§ 159.3 Miscellaneous", paragraph (a) is revised to read as follows:

§ 159.3 Miscellaneous.

(a) Method of payment. Annual assessments and fee payments shall be made by check or money order payable to the Treasurer of the United States. No fees will be refunded.

(D) The amendments herein adopted shall become effective July 1, 1971, except that annual assessments required to be paid under § 36.1 (a) and § 159.2a (a) of these regulations shall first be assessed for the calendar year terminating in the fiscal year of the Commission ending June 30, 1972.

(E) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission. Commissioner Carver concurring in part and dissenting in part filed a separate statement appended hereto.

(SEAL)

Kenneth F. Plumb,
Acting Secretary.

CARVER, Commissioner, *concurring* in part and *dissenting* in part:
(Issued March 18, 1971)

I agree that sound public policy as well as the specific requirements of the Independent Offices Appropriation Act, 1952 dictate that the use of public resources and facilities and the receipt of certain services and functions of the government be supported by user fees or charges assessed against those benefited. The order promulgated herein is therefore well founded, required by law and the rates established bear a reasonable relationship to the cost of the services involved, and I join in approving it, except as to that portion of it which adds Part 36, relating to Annual Charges and Fees under Parts II and III of the Federal Power Act.[1] I cannot concur in that part of the order, and the reasons for my dissent are stated briefly below.

As a basic philosophical premise, I do not believe that general governmental functions, unrelated to special services or privileges extended by the sovereign, should be made self-sustaining through levies upon particular persons or industries. Regulation in the public interest is conducted for the benefit of the general public; it ought to be financed out of the general fund of the Treasury in the same manner as other governmental functions.

It is a fiction that this part of the fee structure falls upon the regulated companies. All regulatory costs

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[1] I recognize that some part of the schedule of fees applicable to natural gas companies is subject to the objections specified to inclusion of Part 36. I have chosen not to try to differentiate the acceptable from the unacceptable, as not necessary for the objectives of this dissent.

are always includible in the cost of service, so that the incidence of these fees will fall upon the ratepayers. Although consumers of utility services are broadly representative of the total taxpaying public, it is notorious that utility rates are more favorably disposed toward the larger consumer. Thus, a heavier proportion of the fee burden will attach to those least able to pay. It is, in effect, a regressive impost which is contrary to the general tax philosophy at the Federal level.

To the extent that Part 36, added to our regulations by this order, attempts to recover administrative costs above and beyond those that have direct relation to a service rendered or privilege enjoyed (such as an annual charge on some *ad valorem* basis), it ceases to qualify as an authorized regulation establishing a fee structure. It is based on revenue requirements, rather than costs incurred or value received, and as such is more accurately defined as levying a tax. I find nothing in either the Federal Power Act or the Natural Gas Act, nor in Title V, Independent Offices Appropriation Act, 1952, which permits or requires us to levy and collect taxes.

The levy of an annual fee as a revenue measure is objectionable as bad public policy and is not legally sound.

/s/ John A. Carver, Jr.
JOHN A. CARVER, JR. Commissioner

APPENDIX

The following companies and industry associations filed responses to the invitation contained in the Notice of Rule-making in Docket No. R-408 (apart from those requesting additional time in which to do so):

Alabama Power Company
Algonquin Gas Transmission Company
Allegheny Power Service Corporation on behalf of seven public utilities
American Electric Power Service Corporation on behalf of seven public utilities
Arizona Public Service Company
Arkansas Power & Light Company
Carolina Power & Light Company
The Cincinnati Gas & Electric Company
Colorado Interstate Gas Company
Columbia Gas System Service Corporation
Consumers Power Company
The Dayton Power and Light Company
Delmarva Power & Light Company of Maryland
Delmarva Power & Light Company of Virginia
Duquesne Light Company
Edison Electric Institute
Florida Power Corporation
Georgia Power Company
Gulf Power Company
Idaho Power Company
Illinois Power Company
Independent Natural Gas Association of America
Iowa-Illinois Gas and Electric Company
Iowa Southern Utilities Company
The Kansas Power and Light Company

Kentucky Utilities Company
Louisiana Power & Light Company
Michigan Gas Storage Company
Minnesota Power & Light Company
Mississippi Power Company
The Montana Power Company
Natural Gas Pipeline Company of America
New England Power Service Company on behalf of four public utilities
New Orleans Public Service Inc.
Otter Tail Power Company
Pacific Gas and Electric Company
Pacific Power & Light Company
Pennsylvania Power & Light Company
Philadelphia Electric Company
Phillips Petroleum Company
Public Service Electric and Gas Company
Puget Sound Power & Light Company
Southern California Edison Company
Texas Gas Transmission Corporation
United Natural Gas Company
Utah Power & Light Company
Washington Gas Light Company
Wisconsin Electric Power Company
Wisconsin Power & Light Company

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman,
Lawrence J. O'Connor, Jr.,
John A. Carver, Jr.,
and Albert B. Brooke, Jr.

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	Docket No. R-408

ORDER DENYING REHEARING

(Issued May 14, 1971)

On November 25, 1970, we issued a Notice of Proposed Rulemaking in this proceeding (35 F.R. 18234, December 2, 1970) proposing to amend the general rules and regulations under the Federal Power Act and the Natural Gas Act to revise the schedule of fees proposed in connection with the filing of certain applications by natural gas companies and to establish new schedules of fees to be applicable to electric utility companies and natural gas companies.

We invited the submission of comments and suggestions by December 16, 1970, but pursuant to requests for additional time the return date was twice extended

ultimately to February 5, 1971. Responses on the merits were timely received from 62 companies and two industry associations raising questions as to the meaning of various proposed revisions of our regulations, suggesting modifications for clarification or in the policy underlying the proposed changes in fee requirements, and objecting on various grounds to the imposition of fees or assessments generally or as to specific items. The comments and recommendations were considered by the Commission and were in substantial part discussed in Order No. 427, which we issued on March 18, 1971, amending our regulations.

Two industry associations, Edison Electric Institute (EEI) and Independent Natural Gas Association of America (INGAA), and four companies, Montana Power Company (Montana), New England Power Company (New England), Southern California Edison Company (Southern California), and Tennessee Gas Pipeline Company (Tennessee), have filed a petition and applications for rehearing, three of them, EEI, Montana, Southern California, on the ground that a conference which the notice of proposed rulemaking stated could be requested was not provided. That notice did not state that a conference would be afforded responsive parties but invited "[s]ubmissions to the Commission [of data, views, comments, and suggestions, in writing] * * * and whether the person filing them requests a conference at the Federal Power Commission to discuss the proposed amendments." It stated also that the "Commission shall consider all such written proposals before acting on the matters herein proposed."

Neither the Administrative Procedure Act, 5 USC

553, nor our rules, nor the statutory authority upon which this action was taken require that conferences be held in connection with rulemaking proceedings of this kind. The only requirement relevant here is that after notice of proposed rulemaking, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments *with or without* opportunity for oral presentation * * *". (Emphasis supplied.) 5 USC 553(c).

It is our announced procedure that the Secretary or staff counsel upon the approval of the General Counsel and the Office or Bureau involved may call a public conference at which all parties who filed comments are invited to participate. As we show, the grounds in sum urged by these three responding parties were in substance previously asserted in their comments or in the comments of other responding parties and were considered by the Commission when the order was adopted. In these circumstances, we find no basis for holding that the staff abused its discretion in not scheduling a conference to discuss their objections.

EEI's application essentially amounted to a reiteration of the same grounds contained in the comments it had previously submitted and of which the Commission was apprised and which it considered when the order was issued. Its statement that it would have filed more comprehensive comments had it anticipated that a conference would not be held carries no weight since the purpose of a conference is to discuss the issues previously raised in the comments submitted in response to an invitation therefor in the notice of proposed rulemaking.

The contention (INGAA, New England, Southern California and Tennessee) that the amended regulations constitute a revenue measure and are violative of the Appropriation Act and Budget Circular A-25 on which they were based does not raise issues which were not fully considered when Order No. 427 was adopted, nor do the allegations of these petitioners suggest valid grounds for rehearing or reconsideration.

Montana and Southern California raise contentions regarding the fairness of the assessment of fees and charges on jurisdictional public utilities and licensees and upon nonjurisdictional revenues and further contend such fees and charges will be unlawfully borne by customers for services not subject to the Commission's jurisdiction. We initially proposed to collect fees and assessments for all the costs of administering Parts II and III of the Federal Power Act upon jurisdictional utilities, in part for specific services rendered in connection with prescribed applications and filings, and in remainder on the basis of the proportion that the gross revenues of each regulated company bears to the total gross revenues of all such companies. As a result of the comments and suggestions submitted we agreed that such allocation would be inequitable since the nature of our administrative activities regarding utility regulation and those concerned with coordination and reliability could not both be fairly attributed to gross revenues.

In the first place, the costs of our administrative activities properly allocable to municipal and other nonregulated systems for either group of programs should not and will not be charged to jurisdictional utilities; secondly, the balance of the costs of admin-

istering the regulatory functions (after deduction of fees obtained for specific applications and filings) will more equitably be based on transfers of jurisdictional energy since the quantum of our services more nearly varies with the sales and deliveries of such energy; and, finally, the costs incurred in the promotion of greater coordination and reliability, being system wide and beneficial to a utility without regard to its jurisdictional business, are fairly allocable on a gross revenue basis.

However, New England asserts that as compared to a vertically integrated public utility which normally sells a large percentage of its (nonjurisdictional) kilowatt hours to customers for consumption, the regulation adopted unfairly penalizes a generation and transmission company which supplies the entire (jurisdictional) kilowatt hour needs of its associate companies principally for distribution. We considered the objection submitted by New England to the allocation of all costs of electric administration on the basis of gross revenues in response to our invitation for comments and in acknowledgment of the unfairness of the provision made appropriate revision, as described above, to avoid making annual charges to cover the costs of public utility regulation on the basis of gross revenues.

We think further revision is not required. Where the associated companies are solely in the business of distributing electric energy not subject to Commission jurisdiction, no fees or other charges will be required of them and where they may have a limited amount of jurisdictional business the duplicative charges will be of little significance. In cases where jurisdiction attaches the services rendered which are subject to the

specific fee schedules set out in Section 36.2 will not be charged to utilities under the assessment provisions of Section 36.1. As to the remainder of the administrative costs of the regulatory programs (less that applicable to nonjurisdictional electric systems), the Commission's programs involve rate surveillance, accounting matters and formal proceedings including rulemaking matters. These activities are conducted for all jurisdictional utilities and we can think of no more equitable method of allocating those charges than on the basis of jurisdictional sales and deliveries of electric energy.

The jurisdiction conferred by the Federal Power Act is based on the transmission and sale at wholesale of electric energy in interstate commerce and were we to make allocations on a basis which exempted this applicant and others having the same corporate arrangement from their proportionate shares of the charges, such action would not be consistent with our responsibilities under that Act.

New England's contention that the inclusion of the costs of electric utility regulation will add to the cost of power which is interchanged and hence discourage coordination among utilities is recognized. However, we believe it will have no significant effect in view of the benefits accorded electric systems by the advantages interconnection provides in enhancing the reliability of service.

INGAA, Tennessee, and New England rely on dicta of the Commission in its notice of proposed rulemaking that culminated in the adoption of Order No. 317, as amended by Order 317-A, 31 F.R. 430, 4890, which added Part 159 to the Regulations under the Natural

Gas Act, as indicative of the Commission's lack of authority to broaden the scope of its charges to provide for the recoupment of certain costs of administration by assessment methods. We were mindful of these views but do not consider them binding upon us. These regulations, as our order pointed out, are predicated on the benefits accorded public utilities and natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress which in our opinion satisfy the statutory requirements for the imposition of these charges.

INGAA's and Tennessee's objection to assessing pipelines for the cost of producer regulation is much too broadly put. The assessment is limited to only one of the various producer programs: the certification of producer sales which plainly benefit pipelines through the Commission's control of the initial prices they are required to pay producers for gas purchases. The Commission's activities in this connection which provide clear benefits to pipelines through regulatory action include the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines.

Both Tennessee and INGAA challenge the fairness of allocating charges on the basis of jurisdictional deliveries. One objection is that no part of the assessments are based on direct sales by pipelines to industrial customers which are nonjurisdictional. We point out that the entire costs of administering the pipeline

programs are not assessed on the basis of jurisdictional deliveries since a substantial part thereof are made up by certificate application fees filed in connection with the construction of pipeline facilities. In this way, a significant portion of expenses of administering the pipeline programs will be made up by payments for the installation of facilities to serve nonjurisdictional customers.

Another objection is that the method of allocation is unfair because it includes deliveries of natural gas between pipelines which, it is argued, sometimes involve double or triple counting of the same volumes of gas. While our method of allocation is somewhat imperfect, we think it is a reasonable method of allocating the portion of pipeline administration costs not obtained from certification of facilities and that it does not work a hardship on the pipelines. The fees paid in this connection by the pipelines form part of their lawful operating costs each pipeline may recover from the purchaser of their gas. More importantly, where several pipelines are involved seriatim in the delivery of the same volumes of gas, the regulatory responsibilities of the Commission are correspondingly increased.

Several of the applicants seek rehearing on the ground that there is no way to approximate the extent of the costs of regulation each utility or gas company will be obligated to pay. We do not think these objections meritorious. The basis for determining the fees to be charged in connection with miscellaneous matters, specified applications and filings, and assessments relating to new gas supplies are clearly set forth in Sections 3.102(b), 36.2, 159.1 and 159.2a(b) of the Regulations. The remaining assessments predicated on

the costs incurred in each fiscal year can be readily approximated from these sources: published data supplied by the Commission annually to the Congress in support of its request for appropriations which show the allocation to be made for each electric and gas program and information published by the Commission showing the gross revenues and sales and deliveries of electric energy by electric systems and jurisdictional sales of natural gas companies.

The Commission finds:

The assignments of error and grounds for rehearing and reconsideration set forth in the applications of EEI, INGAA, New England, Southern California and Tennessee and in the petition of Montana which were filed in this proceeding present no facts or legal principles which were not fully considered by us, or which now being reconsidered by us would warrant any change or modification of the Commission's Order No. 427, issued March 18, 1971.

The Commission orders:

The petition and applications for rehearing and reconsideration of Order No. 427 are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

(SEAL)

KENNETH F. PLUMB,
Acting Secretary.

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	Docket No. R-408

(May 14, 1971)

CARVER, Commissioner, *dissenting:*

This order is addressed essentially to those portions of Order No. 427 which I found unacceptable in my separate opinion in that docket, leaving me no alternative but to dissent herein.

/s/ John A. Carver, Jr.
JOHN A. CARVER, JR., Commissioner

APPENDIX F

Bureau of the Budget Circular No. A-25 (1959) provides in pertinent part:

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a measureable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary

(e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

APPENDIX G

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1621

CLAY BROADCASTING CORPORATION OF TEXAS,
PETITIONER,

VERSUS

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
RESPONDENTS.

No. 71-1990

NATIONAL ASSOCIATES OF BROADCASTERS,
PETITIONER,

VERSUS

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS.

Petitions for Review of an Order of the Federal Communications Commission (Texas Case)

(July 21, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge: These consolidated petitions for review seek to set aside the revised schedule of fees of the Federal Communications Commission which became effective August 1, 1970.[1] The petitioners are representatives of the broadcasting and cable television industries and include several individuals and corporations which have interests in particular broadcast properties. While the contentions of the several parties vary widely the petitioners collectively present a broad challenge to the Commission's authority and the reasonableness of its order imposing the fees adopted July 1, 1970, *Schedule of Fees,* 23 F.C.C.2d 880, 35 Fed. Reg. 10988. Upon review we find that the revised fee schedule is a reasonable exercise of the authority delegated to the Commission by Congress.

The concept of user charges was explicitly authorized by Congress in Title V of the Independent Offices Appropriation Act of 1952.[2] The Federal Communica-

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[1] This Court has jurisdiction to review the Commission's order under 47 U.S.C. § 402(a) and 5 U.S.C. § 701 et. seq.

[2] "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any persons (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or rede-

tions Commission adopted its first fee schedule in 1963 covering all areas of Commission regulation at the time. Report and Order, *Fees*, 34 F.C.C. 811 (1963). That schedule was challenged before the Seventh Circuit Court of Appeals, which affirmed the Commission's order, *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965). Shortly thereafter the Commission announced a policy of keeping its fees schedule under continuing review. See *Fees*, 1 F.C.C.2d 1349 (1965).

On February 18, 1970, the Commission issued a Notice of Proposed Rule Making looking towards the broad revision of its fee schedule. *Schedule of Fees*, Docket No. 18802, 21 F.C.C.2d 502, 35 Fed. Reg. 3815 (1970). The Commission noted that Congress had urged that the activities of the Commission become more nearly self-sustaining and proposed a new schedule of fees which would generate estimated fees approximating the Commission's budgetary request for fiscal year 1971. These fees included increases in those areas which were already subject to at least nominal fees and proposed new fees in areas where the Commission had only recently exercised jurisdiction to regulate—community antenna television (CATV) and radio frequency equipment testing and approval.

In addition to levying application fees, the Commission proposed to give explicit recognition to the "value

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termine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy, or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts. . . ."

31 U.S.C. § 483a (1971).

to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government by imposing fees relating to the value of the authorization of the license.[3] The Commission proposed fees for the grant of applications for assignment of a license or a transfer of interest in a broadcast station which reflected the value which the parties to the transaction placed on the sale. It also proposed an annual fee for broadcast stations based on the licensees' own commercial rates. In the CATV field the Commission proposed to tie the annual fee to the number of subscribers in each system.

After receiving a large number of comments from interested parties, the Commission adopted the revised Schedule of Fees on July 1, 1970. The document was officially released on July 2, 1970, *Schedule of Fees*, 23 F.C.C.2d 880, and was printed in the July 8, 1970 issue of the Federal Register, 35 Fed. Reg. 10988. As indicated in the earlier Notice of Proposed Rule Making[4] the revision abolished broadcast license renewal

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[3] ". . . [T] proposed fees are designed to make the Commission '• • • self-sustaining to the full extent possible • • •' in the work and services it performs in the granting of licenses, authorizations, privileges, benefits, and similar things of value. Moreover, the rationale for the formulation of the new fee schedule gives explicit recognition, in appropriately varying degrees, to the 'value to the recipient' of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government. Therfore, in addition to a continuation of the existing concept of a fee upon filing of an application seeking an authorization, the new fee schedule adopts the concept of a separate fee reflecting our consideration of the 'value to the recipient' factor involved in authorization and licenses."

21 F.C.C.2d at 503-04 (1970).

[4] 21 F.C.C.2d at 507 (1970).

fees in favor of annual operating fees which amounted to 24 times a radio station's highest one-minute spot announcement rate, but not less than $52, and 12 times a television station's highest 30-second spot announcement rate, but not less than $144. The assignment and transfer fee to be paid immediately following the consummation of the transfer was set at 2% of the consideration paid. The new schedule was to be effective August 1, 1970 on all grants made on or after that date. The Commission however excepted from the grant fees those applications filed prior to July 1, 1970, the date of the adoption of the new schedule. The Commission levied an annual fee on CATV systems equal to $0.30 multiplied by the number of subscribers of the system.

Thereafter a number of petitions for reconsideration were filed with the Commission concerning various aspects of its fee schedule. These petitions, in so far as they are material to this case, were subsequently denied, 28 F.C.C.2d 139 (1971). All petitions for review of the Commission's fee schedule rulings, filed pursuant to 47 U.S.C. 402(a) in this and other circuits, have been transferred to this court and consolidated in this case. We consider each of the challenged fees in turn.

I. *Broadcast Annual License Fee*

The National Association of Broadcasters (NAB), a national trade organization with a substantial number of radio and television station members, seeks a review of both the annual license fee and the 2% grant fee on assignment and transfer applications. The NAB contends that the annual fee is in effect a *discriminatory tax* on radio and television. It acknowledges that the

Commission may impose fees upon the broadcast services and that the Commission is not limited to the imposition of nominal fees only. However the NAB contends this annual license fee is unreasonable because it reflects that the *Commission's concern was only with recovering the full amount of the agency's appropriation.* This, it contends, violates the statutory guidelines provided in the act which authorizes agency fees[5] that are "fair and equitable" taking into account: (1) the cost to the Government; (2) the value to the recipient; and (3) the public policy or interest served. It argues that not all of the Commission's activities in the broadcast section are of *specific benefit* to the stations. The Commission and the stations themselves expend a significant amount of time and effort *in activities which serve the general public at large.* But the NAB complains, "the fact is the schedule of fees for the broadcast services hands to commercial licensees *all* of the costs of commission activities in the broadcast field when in fact all of the services are *not* rendered for the benefit of commercial licensees."

In our judgment the NAB misconstrues the legal requirements which the Commission must meet in imposing fees and we believe that its position demonstrates a *myopic misconception of the "benefits"* which the Commission confers on commercial licensees. In the first instance, the weighing of these statutory factors or "whether * * * all * * * must play a quantitative share" in the judgment made, was for the Commission. *Aeronautical Radio, Inc. v. United States,* 335 F.2d 304, 309 (7th Cir. 1964) *citing Secretary of Agriculture v.*

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[5] 31 U.S.C. § 483a. *See* note 2 *supra.*

Central Refining Roig Co., 338 U.S. 604, 611, 612, 94 L.Ed. 381, 388, 389, 70 S.Ct. 403, 407 (1950). Additionally Bureau of the Budget Circular A-25 which provides "The maximum fee for a special service will be governed by its *total cost* and *not by the value of the service* to the recipient" *does not compel the Commission to precisely pro-rate its costs* in performing the various services in the Broadcast Bureau and limit the fee for each service to its precise administrative cost.[6] Indeed such precision would be difficult if not altogether impossible to achieve.[7]

The record indicates that the Commission estimated the direct and indirect costs of regulating the broadcast industry to be $9,661,200 or 38.8% of the Commission's fiscal year 1971 budget. 23 F.C.C. 2d at 882. After giving consideration to the other factors,[8] the Commission settled on a schedule in which the broadcast fees were

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[6] We find no merit in the NAB's contention that these fees are in reality an unlawful tax because the money involved is not approximately equal to the *amount of work* rendered by the Commission in behalf of the party against whom the charge is made. The Commission is clearly entitled to charge such fees to recover its costs as are fair considering the value to the recipient, public policy and other pertinent facts. 31 U.S.C. § 483a. By the very terms of the statute "value to the recipient" is not limited to the amount of work performed but also includes any ". . . . service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or other similar thing of value or utility. . . " *Id.*

[7] E.g., processing an application for increase in a station's power would appear to be a cost properly chargeable to both the applying station for expansion of its signal contour, and to those stations which might receive interference from the power increase for the protection of their signal contours.

[8] I.e., the "value to the recipient" and "public policy" factors. 23 F.C.C.2d at 882.

estimated to produce $9,600,000. That figure represented less than 0.3% of the approximately $3.5 billion gross revenues generated by the broadcast industry in 1968. In exchange, commercial licensees receive an exclusive right to operate for a profit on a portion of the public's electromagnetic spectrum. The Commission regulation of the broadcast industry generally provides individual licensees with continuing protection from technical interference as is consistent with the public interest and maintains the market structure which makes it possible for commercial broadcasting to operate at a profit. We therefore are unable to find that the Commission acted unreasonably or arbitrarily in imposing on commercial licensees an annual fee which is part of a schedule calculated to fully recover the direct and indirect costs of regulating the broadcast industry.[9]

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[9] We also find no merit to the NAB's contention that the Commission's fees are improper because they fail to take into consideration the large number of unprofitable stations. In the response to the petitions for reconsideration the Commission noted:

> "The Commission is keenly aware of the significant number of unprofitable broadcast stations and of the contention that the annual operating fees would cause a diminution of program services by broadcast stations, particular in the marginal and unprofitable stations. We would emphasize, however, that no evidence has been submitted in support of these assertions, and that since all broadcast licensees have established financial qualifications sufficient to carry on their broadcast operations, it is highly unlikely that the new fee schedule would constitute a significant burden in a broadcast station's total operation. * * * The Commission will, of course maintain a continuing review in this area, and if the facts indicate a change is necessary, appropriate revisions will be made. Meanwhile any license whose financial situation is such that the annual operating fees will cause a diminution of program service to the public, or otherwise materially affect his opera-

II. *Two Percent Grant Fee*

The NAB and a number of individuals with particular broadcast interests [10] also challenge the imposition of a fee of 2% of the consideration paid following consummation of the assignment of a license or transfer of control as approved by the Commission. 23 F.C.C.2d at 903. We find no merit to the NAB's contention that the 2% figure is arbitrary or unfair because it does not precisely reflect the different amounts of effort the Commission expends in considering the applications of varying complexity.[11] Furthermore, we are unable to accept its argument that the amount paid solely reflects the transferors' assets and good will, or its inference that the Commission has already been compensated by the fee paid when the application for transfer was filed for any work performed for the transferee.

In transferring the license the Commission is granting to the transferee a privilege similar to the grant of a construction permit for a new station. In considering the value of the transfer the Commission noted "unlike construction permits, which often involve competitive applications and comparative hearings and which simply authorize a new station of undetermined profitability, assignments of license and transfer of control

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tion, may petition the Commission for a waiver of the annual operating fee for a given period, and show good cause for relief requested." 28 F.C.C.2d 143 (1971).

[10] Clay Broadcasting Corporation of Texas; WBLI, Inc.; Dorothy Meythaler, Executrix of the Estate [Last Will and Testament] of Merlin J. Meythaler and Merton J. Gonstead d/b/a Livingston County Broadcasting Company and Dorothy Meythaler and Merton J. Gonstead d/b/a Pontiac FM Broadcasting Company; Steuben Broadcasters, Inc.; Forward Communications Corporation.

[11] See f.n. 6, *supra*.

are insulated from competition and concern a going business whose profitability is reflected in a judgment by the parties who have reached agreement on the price to be paid." 21 F.C.C.2d at 506-07. Given this explicit consideration of the "value of the benefit conferred" with the cost to the government and public policy involved we are not persuaded that a grant fee measured by 2% of the consideration paid is unreasonable.

A more serious question is presented by the individual petitioners with respect to the time schedule adopted by the Commission for the institution of these grant fees. In the schedule the Commission set an "effective" date of August 1, 1970, after which the grant fees would be imposed. However the Commission exempted from this fee those applications granted after August 1, 1970 but which were filed with the Commission prior to July 1, 1970. Two of the individual petitioners, Meythaler and Steuben, filed applications on July 1 and 2, 1970, but prior to the public announcement that the new fee schedule had been adopted and that it would apply to the grant of their applications. Essentially they contend that they relied on the prior fee schedule in negotiating their contracts and that the new rule has the effect of retroactively applying the grant fee to them.

The remaining petitioners, Clay, Forward and WBLI, all filed applications for transfer or assignment during July 1970 but after the Commission had published the new schedule. These petitioners contend that notwithstanding the Commission's assignment of August 1, 1970 as the "effective" date, the real "impact" date was July 1, 1970. They therefore argue: (1) the commission erred in distinguishing the filing date from

the "effective" date; (2) the Commission violated the Administrative Procedure Act [12] and its own rules [13] in providing no notice or less than 30 days notice prior to the "effective" date of the rule; and (3) that once the Commission decided to afford an exemption for some applications on file prior to the effective date it could not lawfully exclude July filed applications from this exception. Although we might well have done otherwise if the question was ours to decide in the first instance, we can not find that the Commission's chosen "effective" date and its exemption are arbitrary, unreasonable or unlawful.

Despite arguments to the contrary we are not convinced that the grant fee is being applied retroactively to applications filed in July. The fee is not automatically imposed on all filed applications for assignment or transfer. The 2% fee is charged only after the Commission has processed the application and decided to grant the transfer or assignment. Even then the fee is not required unless and until the consummation of the assignment because of the uncertainties of the date of closing and other factors.[14] The closing of the transfer or assignment following Commission approval is an event of sufficient independence from the mere filing of the application that the imposition of a fee upon transfers to be made in the future is not a retroactive fee upon those applications already on file but not yet granted. Thus we are unable to conclude that the Commission acted arbitrarily in using the date of grant for

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[12] U.S.C. § 553(d) (1971).

[13] C.F.R. § 1.427 (1971).

[14] 23 F.C.C.2d at 888.

the "effective" date of the fee instead of the date of filing. *See Buckeye Cablevision, Inc. v. F.C.C.*, 387 F.2d 220, 227 (D.C. Cir. 1967).

In the Commission's Report and Order adopting the new fees it stated that the fees were being made "effective" on August 1, 1970, although it was aware that 30 days' official notice by publication in the Federal Register was not possible.[18] The Commission noted that it believed that good cause existed for an August 1, 1970, effective date citing three factors: (1) widespread notice in fact would be provided affected parties; (2) a first of the month effective date was required for administrative pro-ration of yearly fees; and (3) that in accordance with Congressional directives the Commission wanted the fee schedule to cover as much of fiscal 1971 as reasonably possible. We find that the Commission's statement of "good cause" sufficiently meets the requirements of both the Administrative Procedure Act and the Commission's rules.; *See Buckeye Cablevision, Inc.*, 387 F.2d at 228 n. 34; *cf. Pent-R-Books, Inc. v. United States Postal Service*, 328 F.Supp. 297, 312 (E.D. N.Y. 1971).

We are also not convinced that the Commission either was required to include or was unreasonable in excluding July filed applications for transfer or assignment from the exception to the grant fee afforded applications filed prior to July 1, 1970. There is something arbitrary about the drawing of any administrative line. To some extent whether a line appears to be "reasonable" to a party depends upon which side of the line the party falls. The difficulty in drawing fair and rea-

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[18] 23 F.C.C.2d at 885.

sonable lines in the communication industries is considerably exacerbated by the rapid technical and economic expansion of the various media. *E.g., Buckeye Cablevision, Inc. v. F.C.C.*, 387 F.2d 220 (D.C. Cir. 1967) ['Grandfather clause' permitted systems carrying distant signals before the regulations were announced to continue to do so]; *Kessler v. F.C.C.*, 326 F.2d 673 (D.C. Cir. 1963) ['Freeze' on new station applications effective when announced although applications then on file would be processed].

In the present case the Communications Act has a built in 30 day holding period on applications for assignment or transfer before the Commission may grant them.[16] In excepting those applications already on file by July 1, 1970, the Commission excluded from the grant fee those applications which it had the authority to grant prior to the August 1, 1970 effective date of the fee.

In response to criticism following the adoption of the fees the Commission noted that it had established this exception in order to eliminate any claim that action on matters filed prior to the date of adoption of the new fee schedule might be delayed until on or after August 1, 1970, so as to be able to exact the new grant fees. 28 F.C.C. 139, 141 (1971). The Commission also noted that no claim of surprise as to the adoption of the new fee schedule can properly be made, since the notice of proposed rule making had been issued in February 1970, 4½ months prior to July, 1970, and since the Commission's representations to the Congress that a new fee schedule would be adopted by the beginning of fiscal

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[16] 47 U.S.C. § 309(b) (1971).

year 1971 had been widely reported. *Id.* As in *Kessler,* "The issue is not what we might have done ourselves or what we might think would have been more reasonable. The issue is whether what the Commission did, in the light of the reasons it gave, was unreasonable and capricious." 326 F.2d at 686. Here, as in *Kessler,* we cannot conclude that it was.

III. *Annual Fee for CATV*

The National Cable Television Association, Inc. (NCTA) and the California Community Television Association jointly challenge the portion of the Commission's fee schedule which imposes an annual fee of $.30 per subscriber on all CATV systems. NCTA contends that the Commission lacks the authority to impose any sort of an annual fee in cable television, and that in any event this annual fee fails to meet the statutory requirements [17] and amounts to a tax because it fails to consider the statutory element of "value to the recipient" (i.e., the CATV operators) conferred by the FCC regulation of the industry. Finally NCTA asserts that the fees charged CATV operators are based upon a miscalculation of the actual costs of regulating CATV and that the fees are disproportionately higher for CATV than for other regulated industries. We find no merit in any of these contentions.

The Commission's efforts to regulate CATV have not been consistent.[18] The new technology which made cable television possible was thought at first to fall wholly

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[17] 31 U.S.C. § 483a (1971).

[18] United States v. Southwestern Cable Co., 392 U.S. at 161 to 167, 20 L.Ed.2d at 1007 to 1010. *See also,* Note, The Wire Mire: The FCC and CATV, 79 Harv. L. Rev. 366 (1965).

between the cracks of the Commission's statutory authority,[19] but in recent years the Commission has asserted an increasingly expansive jurisdiction over cable TV. The potential economic impact of CATV technology on other broadcast media spawned the initial regulatory efforts by the FCC.[20] This collateral impact on other regulated media has been used to justify the Commission's "ancillary" regulation of CATV. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 20 L.Ed.2d 1001, 1016 (1968).[21] In *General Telephone Co. of Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971) we upheld the Commission's rules which prohibited telephone companies from furnishing CATV services in their telephone service areas and restricted their construction of cable facilities. Although the question in that case was whether the Commission had properly exercised its unquestioned authority over common carriers,[22] we recognized that the development of CATV is part of the broader purpose of the Commission under 47 U.S.C. § 151.[23] 449 F.2d at 854.

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[19] *See*, 1959 Report and Order, 26 F.C.C. 403, 426-31.

[20] Carter Mountain Transmission Corp. v. F.C.C., 32 F.C.C. 459 (1962) *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied* 375 U.S. 951 (1963).

[21] The Court stated: "There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting . . . We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." 392 U.S. at 178, 20 L.Ed.2d at 1016.

[22] 47 U.S.C. § 214 (1971).

[23] "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make

Most recently the Supreme Court in *United States v. Midwest Video Corp.*, —— U.S. ——, —— L.Ed.2d ——, 40 L.W. 4626 (June 7, 1972), has held that the Commission has jurisdiction under 47 U.S.C. § 152(a) over CATV systems and operations which may be exercised to protect and promote the objectives for which the Commission had been assigned jurisdiction over broadcasting. —— L.Ed.2d at ——, 40 L.W. at 4632. The court upheld the Commission's authority to require that CATV systems with more than 3,500 subscribers operate to a significant extent as a local outlet by originating programing and make available facilities for local programing.

It seems apparent to this court that under the Commission's regulatory scheme which existed from the time of the adoption of these fees until the present, CATV operators have received "valuable benefits" sufficient to justify the imposition of the annual fee. Although the Commission does not issue licenses for CATV systems as it does for broadcast stations, CATV operators have directly benefited from the Commission's various regulations designed to keep entry into the industry open.[24] The Commission has also proposed

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available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable charges, . . . there is created a commission to be known as the 'Federal Communications Commission' . . ." 47 U.S.C. § 151 (1971).

[24] *See* General Telephone Company of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971) [in which NCTA intervened in support of the Commission's regulations]. The Commission has restricted television broadcast station and translator station ownership of CATV systems in their service area, 23 F.C.C.2d 816 (1970), prohibited broadcast network ownership of cable systems, 23

rules limiting the amount of franchise fees which local governments could charge cable operators.[25] Indeed, as the Commission points out, the entire regulation of cable television is undergoing radical change, much of which clearly inures to the benefit of cable operators.[26]

It is true that some of the Commission's direct regulation of CATV has tended to restrict cable development in order to protect other media.[27] But the inquiry under 31 U.S.C. 483(a) is not whether the regulated industry likes or agrees with all the regulations prescribed, but whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission. CATV operators in effect merchandise the broadcast signals which the Commission has authorized by its regulation. The scarcity of television outlets which exists under the Commission's regulation of the broadcast market structure creates much of the economic value of the distant signal importation by CATV. It is therefore clear the CATV operators do receive benefits of real value from the Commission's regulation of CATV and the related broadcast media.

We have already observed in Section I of this opinion that the statutory factors of benefit, costs and policy are for the Commission to weigh. *Aeronautical Radio, Inc.*, supra. In this instance the Commission observed:

F.C.C.2d 816 (1970), and proposed rules banning cross-ownership of newpapers and cable systems in the same area, 23 F.C.C.2d 833 (1970).

[25] Notice of Proposed Rule Making, CATV, Docket No. 18892, 25 F.C.C.2d 50, 53 (1970).

[26] Cable Television Proposals, 31 F.C.C.2d 115 (1971).

[27] E.g., Buckeye Cablevision, Inc. v. United States, 438 F.2d 948 (6th Cir. 1971).

"47. The 30-cents-per-subscriber-annual-fee formula has been attacked on diverse grounds: that it fails to take into consideration that different systems charge different subscription rates; that operating costs vary even when subscription rates are the same; that in some cases local franchise agreements bar systems from passing increased costs on to subscribers via rate increases; and that the 30-cents-per-subscriber fee would cut sharply into narrow profit margins.

48. The very diversity of these criticisms (which were not accompanied by specific supporting data) suggests that it would be exceedingly difficult to devise a formula that would be proof against all attack. In defense of the formula adopted, we would note: (i) that generally available information about the CATV industry indicates that subscription rates tend to cluster at about $5 per month or a bit higher; (ii) that 30 cents per subscriber per year appears to constitute in the typical case only one-half of 1 percent of CATV system gross revenues from subscription fees, if that much; (iii) that, particularly in view of the smallness of the fee, alternative formulas involving more complicated calculation to verify adequacy of fee payment might be more precise but, under the circumstances, are unnecessary; (iv) that the Commission lacks reliable information about the operations and internal finances of CATV systems, but is currently readying new rules and procedures which will enable it to obtain such information, via annual, reporting by CATV systems; and finally, (v) that as the Commission obtains such informa-

tion it will use it for periodic review of the equity of its CATV fee schedule."

23 F.C.C. at 897-88 (1970).

The Commission's formulation clearly evidences consideration of the benefits to CATV systems as measured by the number of subscribers, the direct and indirect costs of the Commission's efforts to regulate the industry, and the Congressional policy that the Commission make its work of specific benefit "self-sustaining to the full extent possible," under 31 U.S.C. 483a. Considering all factors revealed by the record the balance which the Commission struck was not unreasonable or arbitrary in our opinion. If experience shows that the Commission's fees are unfair, unworkable or have an adverse effect on competition in the CATV industry the Commission can be expected to revise them in order to meet the exigencies of the competitive situation. *General Telephone Company of the Southwest v. United States,* 449 F.2d 846, 858 (5th Cir. 1971).

For the reasons stated we find that the Commission did not exceed or abuse its statutory authority in imposing the fees contained in its July 1, 1970, Report and Order. The order of the Commission is in all respects AFFIRMED.

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No. 72-1162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

FEDERAL POWER COMMISSION,
Petitioner,

v.

NEW ENGLAND POWER COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR NEW ENGLAND POWER COMPANY IN OPPOSITION

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April 14, 1973

INDEX

	PAGE
Question Presented	1
Statement	2
Reasons for Denying the Writ	4
Conclusion	9

TABLE OF CITATIONS

CASES:

Aeronautical Radio, Inc. v. *United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965) 6

Clay Broadcasting Corp. v. *United States*, 464 F.2d 1313 (5th Cir. 1972), petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States*, No. 72-948... 4, 5

Duke Power Company v. *FPC*, 401 F.2d 930 (D.C. Cir. 1968) 2

Jersey Central Power & Light Company v. *FPC*, 319 U.S. 61 (1943)..... 3

STATUTES AND REGULATIONS:

Federal Communications Act of 1954, 47 U.S.C. § 151, *et seq.* 5

Sections 201-222, 47 U.S.C. §§ 201-222..... 6

Federal Power Act, 16 U.S.C. § 791, *et seq.*:

Sections 1-29, 16 U.S.C. § 791, *et seq.*..... 3

Section 10(e), 16 U.S.C. § 803(e)..... 3

Section 201(a), 16 U.S.C. § 824(a)..... 3

Sections 201-209 and 301-320, 16 U.S.C. § 824(a), *et seq.* and § 825(a), *et seq.* 2, 6

Independent Offices Appropriations Act, 1952, Title V, 31 U.S.C. § 483a.....3, 5, 7

PAGE

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 301, *et seq.* 8

Public Utility Holding Company Act of 1935, 15 U.S.C. § 79, *et seq.* 3

Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 301, *et seq.* 8

47 C.F.R. § 76.11(a) 6

MISCELLANEOUS:

45 F.P.C. 440, 36 Fed. Reg. 5593 (1971) 2

30 Fed. Reg. 12077 (1965) 3

37 Fed. Reg. 8074 (1972) 8

38 Fed. Reg. 4272 (1973) 8

Brief for the United States in Opposition, *National Cable Television Association* v. *United States*, No. 72-948 6

Circular A-25, Bureau of the Budget (1959) 5, 7

Congressional Record, Volume 97, page 4809 (1951) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1162

FEDERAL POWER COMMISSION,
Petitioner,

v.

NEW ENGLAND POWER COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR NEW ENGLAND POWER COMPANY IN OPPOSITION

Question Presented

(A restatement of the issue presented by Petitioner.)

Whether Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. § 483a), authorizes an annual assessment upon electric utilities by the Federal Power Commission to recover the cost of its activities under Parts II and III of the Federal Power Act (16 U.S.C. § 824(a), *et seq.*).

Statement

This case arises from Federal Power Commission ("FPC") Order No. 427 of March 18, 1971, 45 FPC 440, which established in regard to electric utilities, such as respondent New England Power Company ("NEPCO"): (a) filing fees to cover the cost of processing applications seeking FPC approvals under Parts II and III of the Federal Power Act;[1] and (b) annual assessments to recoup the cost of other FPC activities under Parts II and III.[2] It is the latter charges only which were challenged and set aside by the court below.

While Parts II and III authorize a wide range of activities by the FPC, regulatory jurisdiction over electric utilities under Parts II and III is strictly limited. They do not provide the FPC any jurisdiction over facilities used for the generation, intrastate transmission or local distribution of electric energy, nor do they include licensing or certification of facilities necessary to conduct even interstate business. *Duke Power Company* v. *FPC*, 401 F.2d 930 (D.C. Cir. 1968).

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[1] Public utilities must make filings or file applications in connection with the export of electric energy to a foreign country (section 202(e)); certain dispositions and consolidations of property in interstate commerce and purchases of securities (section 203); security issuances of certain public utilities and assumptions of liability (section 204); wholesale for resale rate schedules and contracts governing inter-utility relationships in interstate commerce (section 205); and the holding of certain interlocking directorates (section 305).

[2] Such activities include national and region power surveys, interconnection analyses and reliability studies (section 202(a)); complaints concerning interconnections (section 202(b)); investigations concerning rates and adequacy of service (sections 206 and 207); the establishment and updating of systems of account and auditing of accounts (section 301); depreciation studies and audits (section 302); establishing and requiring periodic and special reports (section 304); and investigations relating to electric energy (section 311).

Parts II and III, enacted in 1935, were designed to fill the gap in State regulatory authority when electric utilities operate in interstate commerce. *Jersey Central Power and Light Company* v. *FPC*, 319 U.S. 61 (1943). Congress left to the States their pervasive authority over the facilities, standards of service, retail rates and activities of electric utilities in general within each State. The regulatory provisions of Parts II and III, by the terms of the statute, " . . . extend only to those matters which are not subject to regulation by the States." Section 201(a).

Electric utilities such as NEPCO, which is a subsidiary of the New England Electric System, are also subject to Securities and Exchange Commission jurisdiction under the Public Utility Holding Company Act of 1935. 15 U.S.C. § 79, *et seq.*

Part I of the Federal Power Act,[3] 16 U.S.C. § 791, *et seq.*, which requires an FPC license for the use by non-federal entities of waters of the United States for the development of power, has a specific provision for assessments upon licensees to recover its cost of administration (section 10(e)). Parts II and III have no provision for recovering the cost of FPC activities under them. As authority for the annual assessments, the FPC cited Title V of the Independent Offices Appropriations Act, 1952, 31 U.S.C. § 483a.

In 1965 the FPC, in considering Title V, stated that fees

> "with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act . . . would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies." 30 Fed. Reg. 12077.

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[3] Originally, the Federal Water Power Act of 1920, 41 Stat. 1063.

In its 1971 order adopting the annual assessments, however, the FPC argued that its administration of Parts II and III had redounded to the benefit of the electric utility industry

> "by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability . . ." (Pet. App. p. 3a),

and that the FPC had therefore provided a "benefit" to electric utilities within the meaning of Title V for which it was authorized to charge the industry.

Respondent NEPCO sought review of the 1971 Order. The court below set aside that part of the FPC Order which established annual assessments to recoup the cost of FPC activities other than the processing of applications.[4] The court held that these activities primarily benefit the general public as ultimate customers, and that, therefore, Title V did not authorize annual assessments upon electric utility companies to pay for them.

Reasons for Denying the Writ

1. There is absolutely no conflict between the decision of the court below and the holding of the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313.[5] The court below struck down annual assessments upon electric utilities to pay for FPC activities not directly related to the processing of applications required by its

[4] NEPCO challenged (1) the lawfulness of the annual assessments and (2) the fairness of the particular formulae by which they were to be applied. The court below found it was unnecessary to reach NEPCO's second point in view of its disposition of the first point.

[5] Petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States, et al.,* No. 72-948.

limited jurisdiction over electric utilities, while the latter upheld annual fees assessed to recover the Federal Communication Commission's ("FCC") cost of licensing and regulating broadcast licensees and CATV systems which require FCC authorization to operate. In the former case, the FPC activities for which cost recovery is sought do not affect the authority of electric companies to do business, and these companies are not the recipients of special benefits; as the court below held, the primary beneficiary is the general public. In the latter case, the FCC activities directly relate to the authority of those being assessed to do business, and they, therefore, are identifiable as recipients of special benefits.

The court below held that Title V was enacted to recoup costs "from identifiable 'special beneficiaries' where the services rendered inured to the benefit of special recipients not the general public" (Pet. App. p. 7a), and that electric utilities were not such special beneficiaries of the activities for which the FPC sought cost recovery. The court further concluded that the creation of an "economic climate", the special benefit claimed by the FPC, was not the kind of service contemplated by either Title V or by Budget Circular A-25 (Pet. App. pp. 61a-62a; Pet. App. p. 9a).

In *Clay Broadcasting, supra,* the Fifth Circuit upheld the adoption by the FCC pursuant to Title V of set, annual fees to be paid by broadcast licensees and CATV systems each year during the period they are authorized by the FCC to operate. Broadcast licensees and CATV systems carry on their business operations because of actions taken by the FCC under the Federal Communications Act of 1954, 47 U.S.C. § 151, *et seq.* Broadcasters must apply to the FCC for a license to operate on a portion of the public's electromagnetic spectrum. CATV operators not only use the broadcast signals licensed by the FCC but must operate

their systems in accordance with FCC regulations. 47 C.F.R. § 76.11(a).

Prior to the enactment of Title V, broadcast licensees were specifically mentioned as beneficiaries of governmental services to which Title V would apply. See remarks of its principal proponent in the House, Representative Yates. 97 Cong. Rec. 4809 (1951). The only issue in regard to annual license fees assessed against broadcast licensees would appear to be the reasonableness of the fees, and on this matter the agency involved has wide discretion. *Aeronautical Radio, Inc.* v. *United States,* 335 F.2d 304 (7th Cir. 1964), *cert. denied,* 379 U.S. 966 (1965).

Electric utilities operate independently of the Federal Power Commission. They are authorized to engage in business pursuant to state laws and local franchises. No permission to enter the field is needed from the Federal Power Commission. As heretofore noted, it is only with respect to certain interstate activities that compliance with FPC regulations is required. In this respect electric utilities are similar to locally franchised telephone companies over whose interstate rates the FCC has regulatory jurisdiction comparable to that of the FPC over electric utilities. Compare 47 U.S.C. §§ 201-222 and 16 U.S.C. §§ 824-825. The FCC, however, has not adopted any schedule of annual charges to be paid by telephone utilities for the cost of administering the Communications Act.

There is no conflict between Circuits on the application of Title V.[6] No licenses to do business are issued under

[6] Even the Solicitor in his brief opposing certiorari in *Clay Broadcasting* acknowledged the existence of a "most fundamental factual distinction between the two cases." Electric utilities make no use comparable to that of broadcast and CATV systems of public property, viz., the public electromagnetic spectrum. Brief for the United States in Opposition, No. 72-948, fn. 4, p. 11.

Parts II and III. In addition to processing applications, for which it has prescribed fees, a substantial portion of the FPC's Part II and III work is devoted to matters of broad consumer and investor, as well as utility, interest. Its activities include energy, accounting and depreciation studies and investigations, national power survey studies, rulemakings, legislative proposals and electrical reliability and coordination studies. Plainly, these agency activities find support as a benefit to the general public and not to identifiable persons, as the Commission itself recognized in its prior rulemaking and as the court below expressly concluded (Pet. App. pp. 9a-10a). These activities are plainly not the kind of *services* to *persons* for which Title V authorizes charges and fees, and *Clay Broadcasting* does not hold to the contrary.

2. The holding of the court below in regard to annual assessments upon electric utilities is sound and represents the only viable interpretation of Title V. Title V plainly expresses a legislative intent to charge fees only for identifiable services to identifiable recipients and not an intent to charge for administering a statute. In view of the language of Title V, *"any work, service . . . benefit . . . or similar thing of value . . . to or for any person"* (Pet. App. p. 2), something more identifiable than the mere administration of a statute is required to be provided before a charge can be made.

Implicit in Title V is a requirement that an agency distinguish between its services to individual recipients and those to the public in general before adopting a fee schedule.[7] The Atomic Energy Commission, for example, in pro-

[7] A requirement made explicit by the Bureau of the Budget's Circular A-25 (Pet. App. p. 61a).

posing revisions to its fee schedules earlier this year did make such a distinction, as it also had done in connection with its current fee schedules.[8] The FPC by its assessment system attempted to avoid the requirement.

The assessment of all entities, either subject to regulation or eligible to apply to an agency for some *work, service* . . . or *benefit,* simply has no support in the terms of the statute and, if the FPC interpretation had been upheld, would have sanctioned some very unreal applications of Title V. Labor Unions and administrators of pension plans, for example would appear to be subject to an annual assessment by the Department of Labor for all the costs of administering the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, *et seq.,* and the Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 301, *et seq.* Is there any Federal agency which would deny that its regulation has created a favorable "economic climate" for those entities subject to its jurisdiction? When the legislative intent has been to require a group to pay for the cost of administering a regulatory statute, it has been expressed, as the court below noted (Pet. App. p. 13a), in terms quite different from those contained in Title V.

3. The decision of the court below in no way affects the jurisdiction of the FPC under the Federal Power Act, and

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[8] The AEC stated in the order adopting its current fee schedule:

> The regulatory costs associated with the processing of licenses and health and safety compliance and inspection activities were used in developing the fees. *No costs related to rule making, development of standards, codes and criteria, safeguards activities, and administration of the State relations program were included.* (Emphasis added.) 37 Fed. Reg. 8074 (1972).

A similarly stated exclusion is contained in the AEC Notice of its revised fee schedule. 38 Fed. Reg. 4272-4273 (1973).

it has no effect upon the authority of the FPC to continue to charge substantial fees to those who invoke its processes. The decision below merely confirmed what an earlier FPC had expressly recognized: that its authority under Title V does not authorize charges for activities which are primarily for the benefit of the general public, and which do not provide services to identifiable recipients. Review by this court is unnecessary.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied insofar as it relates to annual assessments for FPC activities under the Federal Power Act.

Respectfully submitted,

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April 14, 1973

SUPREME COURT, U. S.

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No. 72-1162

In the Supreme Court of the United States

OCTOBER TERM, 1972

FEDERAL POWER COMMISSION, *Petitioner,*

v.

NEW ENGLAND POWER COMPANY, INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, TENNESSEE GAS PIPELINE COMPANY, a Division of TENNECO INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT, INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statute involved	3
Statement	3
Argument	7
Conclusion	15

Appendix A, Notice of Proposed Rulemaking, Docket No. R-408, issued November 25, 1970, 35 Fed. Reg. 18324 ..... 1a

Appendix B, Notice of Proposed Rulemaking, Docket No. R-282, issued September 15, 1965, 30 Fed. Reg. 12077 ..... 17a

CITATIONS

CASES:

Area Rate Proceeding, et al. (Southern Louisiana Area), 46 FPC 86 (1971) 13

Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. 378 (1959) 11, 13

Clay Broadcasting Corp. v. *United States*, 464 F.2d 1313 (5th Cir. 1972) petition for a writ of certiorari pending *sub nom. National Cable Television Association, Inc.* v. *United States, et al.*, No. 72-948 ..... 8, 14, 15

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 11

United Gas Pipe Line Company v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956) 10

Page

STATUTES AND REGULATIONS:

Federal Power Act, 16 U.S.C. 824, *et seq.* 7

Independent Offices Appropriation Act, 1952, Title V, 65 Stat. 290, 31 U.S.C. 483a 2, 3, 5, 6, 7, 8, 9, 11, 15

Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.* 2

Section 4(c), 15 U.S.C. 717c(c) 9
Section 4(d), 15 U.S.C. 717c(d) 9
Section 4(e), 15 U.S.C. 717c(e) 8, 10, 11
Section 5(a), 15 U.S.C. 717d(a) 8, 11
Section 16, 15 U.S.C. 717o 8

Order No. 317, Establishment of Fees to be Paid by Applicants for Natural Gas Pipeline Company Certificates and Other Authorizations, Docket No. R-282, 35 FPC 30, 35 FPC 392 (1966) 3, 5, 12

MISCELLANEOUS:

Bureau of the Budget Circular No. A-25 (1959) ...5, 6, 7, 9, 11, 12, 15

Congressional Record, 97 Cong. Rec. 4809 (1951) 14

H. R. 3880, 82d Cong., 1st Sess. 9

H. Rep. No. 384, 82d Cong., 1st Sess. 9

Notice of Proposed Rulemaking, Establishment of Fees to be Paid by Applicants for Natural Gas Pipeline Company Certificates and Other Authorizations, Docket No. R-282, September 15, 1965 (30 Fed. Reg. 12077) 5, 6, 12

In the Supreme Court of the United States

OCTOBER TERM, 1972

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FEDERAL POWER COMMISSION, *Petitioner,*

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NEW ENGLAND POWER COMPANY, INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, TENNESSEE GAS PIPELINE COMPANY, a Division of TENNECO INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT, INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a)[1] is reported at 467 F. 2d 425. Order No. 427 of the Federal Power Commission (Pet. App. 18a-50a) and its order denying rehearing (Pet. App. 51a-60a) are reported at 45 FPC 440 and 45 FPC 964.

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[1] "Pet. App." references are to the appendices to the Petition in No. 72-1162.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED [2]

1. Whether Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) authorizes the Federal Power Commission to impose upon natural gas pipeline companies subject to its jurisdiction under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, annual general charges designed to recoup the costs incurred in carrying out its regulatory activities against pipeline companies under the rate and accounting provisions of the Natural Gas Act.

2. Whether Title V permits the Commission to impose annual assessments upon natural gas pipeline companies to recover the costs related to its processing of certificate applications by independent producers seeking authorization to sell natural gas.[3]

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[2] Respondent Independent Natural Gas Association of America (INGAA) is a non-profit trade association representing virtually all of the major natural gas pipeline companies in the United States, all of which are subject to the jurisdiction of the Commission under the Natural Gas Act. As it did in the court of appeals, INGAA will address itself to the Commission's Order No. 427 as it affects natural gas pipeline companies.

[3] In the court of appeals, INGAA challenged not only the power of the Commission to impose the annual charges and assessments referred to in Questions 1. and 2. above, but also the methods by which the Commission exercised the disputed power. Concluding that the Commission lacked such power, the court of appeals did not reach the questions raised concerning its exercise (Pet. App. 2a). The Petition is limited to the power question decided below.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 31 U.S.C. 483a, is set forth in the Petition at pp. 2-3.

STATEMENT

This case arises from a proceeding instituted by the Federal Power Commission's Notice of Proposed Rulemaking issued November 25, 1970 (App. A, *infra*, pp. 1a-16a). Therein, the Commission proposed for the first time to impose two types of annual charges upon natural gas pipeline companies for the purpose of recouping costs incurred by it in the administration of the Natural Gas Act.[4]

The Commission proposed an annual general charge to be assessed against Class A and Class B pipeline companies only[5] for the purpose of recouping "the costs of administration of the natural gas pipeline programs" (App. A, *infra*, p. 15a). The Commission first noted that the costs incurred in handling pipeline certificate applications would be made self-sustaining by the proposed increase in certificate ap-

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[4] By its Order No. 317 issued in 1966, the Commission had previously assessed filing fees relating to applications by pipelines seeking specific authorizations under the Natural Gas Act, 35 FPC 30, 392 (1966). By its Notice of Proposed Rulemaking here, the Commission also proposed to increase the existing fees pertaining to pipeline certificate applications (App. A, *infra*, pp. 5a, 14a-15a). Such fees are not in issue here.

[5] Class C and D pipeline companies, having less than $1,000,000 of annual gas operating revenues, were exempted from the annual general charge without explanation.

plication fees. Thereupon, the Commission made clear the purpose of the annual general charge as follows:

> "The remaining costs of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings . . ." (App. A, *infra*, p. 5a).

The Commission proposed that the total annual general charge designed to recoup its costs of pipeline rate regulation would be allocated to each Class A and Class B pipeline company in the proportion that each company's total gas deliveries bear to the total gas deliveries of all Class A and Class B companies (App. A, *infra*, p. 15a).

In addition, the Commission proposed a second annual charge, herein referred to as the "annual reserves added assessment," to be imposed upon those pipeline companies required to file an Annual Report—Total Gas Supply on FPC Form No. 15. This assessment upon each pipeline company was to be one-tenth of a mill for each Mcf[6] of new reserves certificated during the year, as shown on the particular pipeline company's FPC Form No. 15 (App. A, *infra*, p. 16a). The purpose of the proposed assessment is to recoup the Commission's cost of processing the certificate applications of independent producers seeking authorization to sell natural gas. The Commission noted that —for reasons of "administrative convenience"—it was imposing the annual reserves added assessment not upon the producers but on the pipeline companies (App. A, *infra*, p. 6a).

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[6] An Mcf is the equivalent of 1000 cubic feet of gas.

In its Notice of Proposed Rulemaking, the Commission relied upon Title V of the Independent Offices Appropriation Act of 1952 (Pet., pp. 2-3) and Bureau of the Budget Circular No. A-25 dated September 23, 1959 (Pet. App. 61a-62a) as the bases for the increased application fees and the two annual charges proposed to be assessed against the pipeline companies, as discussed above. On March 18, 1971, the Commission issued its Order No. 427 promulgating its proposed rule substantially as proposed, following the submission of written comments by interested persons (Pet. App. 18a-50a).[7]

The objections of INGAA and others to the proposed imposition of the two annual charges upon the pipeline companies were denied. In dismissing the objections to the annual general charge, the Commission conceded that its regulation of pipeline rates and accounting methods "has provided continuing benefit to consumers." Nevertheless, it purported to justify the annual general charge by its conclusory assertion that such regulation has benefitted the pipeline industry "by creating the economic climate for greater usage of the services" of the pipeline companies (Pet. App. 30a-31a).

On rehearing of Opinion No. 427, the Commission's attention was directed to the rulemaking proceeding resulting in its Order No. 317 issued in 1966 in which it promulgated its first schedule of fees for filing applications for specific authorizations under the Natural Gas Act (35 FPC 30). In its Notice of Proposed Rulemak-

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[7] Although Order No. 427 made certain modifications to the proposed rule, these are not material for present purposes.

ing there (App. B, *infra*, pp. 17a-23a), the Commission unequivocally recognized its lack of authority under Title V to impose an annual general charge, comparable to the one in issue now, and stated:

> ". . . The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate *since these activities are primarily for the benefit of the general public rather than the regulated companies*" (App. B, *infra*, p. 18a, emphasis added).

Nevertheless, in its order issued May 14, 1971 denying rehearing of Opinion No. 427 (Pet. App. 51a-60a), the Commission disregarded the above pronouncement, characterizing it as mere dictum (Pet. App. 56a) despite the fact that Title V and the 1959 Budget Circular A-25 had remained unchanged during the interim. Thereupon, the Commission reiterated its generalized view that the annual general charge meets the standards of Title V since it is "predicated on the benefits accorded . . . natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress" (Pet. App. 57a).[8]

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[8] In the same order, the Commission undertook for the first time to justify the imposition of the annual reserves added assessment upon pipeline companies on grounds other than administrative convenience (Pet. App. 57a). This belated justification also constitutes an about-face by the Commission from its first rulemaking proceeding relating to specific fee assessments under the Natural Gas Act (App. B, *infra*, p. 18a).

On petitions for review, the court of appeals set aside the annual general charge and the annual reserves added assessment imposed upon pipeline companies by Order No. 427 (Pet. App. 1a-13a).[9] Determining that Title V authorized the Commission "to recoup costs from identifiable 'special beneficiaries' where the services rendered inured to the benefit of special recipients not the general public", the court concluded that these annual charges could not be imposed since their purpose is to recoup costs incurred in "the administration of programs benefitting the general public" (Pet. App. 7a, 10a). Regarding the annual general charge, the court "wholeheartedly" concurred with the position first taken by the Commission in 1966 that charges or fees designed to recover the costs of rate and accounting regulation of natural gas pipeline companies were inappropriate since these activities are primarily for the benefit of the general public rather than the regulated companies (Pet. App. 10a).

ARGUMENT

The court of appeals correctly held that the annual charges imposed upon natural gas pipeline companies are not sanctioned by Title V of the Independent Offices Appropriation Act of 1952. Having analyzed Title V in light of its legislative history and the interpretation of Title V by the Bureau of the Budget's Circular No. A-25, the court considered the nature and purpose of the annual charges within the confines of

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[9] The court of appeals also set aside the annual charges therein assessed against electric utilities to recoup costs of administering Parts II and III of the Federal Power Act (16 U.S.C. 824 *et seq.*). This aspect of the court's decision will be addressed by New England Power Company in its brief in opposition.

the Natural Gas Act. Since the annual charges are designed to recoup the costs incurred by the Commission in regulating the rates of the pipeline companies, the court concluded, consonant with the purpose of the Natural Gas Act, that such costs primarily benefit the public and cannot be imposed upon the pipeline companies under Title V. Thus, the question decided by the court below is limited by the particular facts and statutes involved and is not one of general applicability or importance. Further, the decision below is clearly distinguishable from and is not in conflict with the approach of the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313, petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States, et al.,* No. 72-948.

1. The primary purpose of the annual general charge is to recover the Commission's cost of exercising its function of reviewing the rates of pipeline companies under Sections 4(e) and 5(a) of the Natural Gas Act, 15 U.S.C. 717c(e), 717d(a).[10] The Commission claims Title V as its authority to impose such charge.[11] Therein, Congress granted federal agencies the power to charge any person for service rendered and benefit conferred only for the purpose of rendering the particular service or benefit as self-sustaining as possible. Title V reflected the concern of the House Committee

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[10] App. A, *infra,* p. 5a.

[11] In the court of appeals, the Commission contended for the first and last time that Section 16 of the Natural Gas Act, 15 U.S.C. 717o, provided ample authority for its imposition. The court of appeals rejected this argument (Pet. App. 11a-13a). The Commission has now abandoned this contention in its Petition.

on Appropriations that "special beneficiaries" of services provided by federal agencies were not being adequately assessed for such services.[12] The guidelines for application of Title V are contained in Bureau of the Budget Circular No. A-25, dated September 23, 1959 (Pet. App. 61a-62a). It provides, as general policy, that a reasonable charge should be made "to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit" (*id.* at 61a). It further states that if such "service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost . . . of rendering that service" (*id.* at 61a). Finally, it states that no charge should be made for services "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public" (*id.* at 62a).

In relying upon Title V and Budget Circular A-25 as support for imposing the annual general charge upon pipeline companies to recoup the costs of regulating their rates, the Commission ignored the nature and purpose of its rate review functions under the Natural Gas Act. The Act requires pipeline companies to file their rates with the Commission and, thereafter, no change in any rate shall be made except after thirty days'

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[12] Title V was a rider to an appropriation measure (H.R. 3880, 82d Cong., 1st Sess.). In its report on Title V, the House Appropriations Committee stated in pertinent part:

> "The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries." H. Rep. No. 384, 82d Cong., 1st Sess. (1951), p. 2.

notice, 15 U.S.C. 717c(c) and (d). If the notice period expires without Commission action, the rate change becomes effective. However, upon the filing of a notice of rate change, the Commission may, in its discretion, initiate a hearing concerning the lawfulness of the noticed rate and suspend its effectiveness for no more than five months. At the end of the suspension period, the noticed rate shall go into effect upon motion of the pipeline company subject to possible refund, 15 U.S.C. 717c(e). This Court has observed that the Natural Gas Act "evinces no purpose to abrogate private rate contracts as such". *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332, 338 (1956). In the foregoing statutory context, this Court in *Mobile, supra,* has observed that:

> ". . . the Natural Gas Act permits the relations between the parties to be established initially by contract, *the protection of the public interest* being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public" (350 U.S. at 339, emphasis added).
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> . . . . .
>
> ". . . In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act" (350 U.S. at 343, emphasis in the original).

In light of the foregoing, it is unreasonable to suggest that a pipeline company, whose rates the Commission decides to review, is a "special beneficiary" of a

service rendered by the Commission at the pipeline company's request. While a pipeline company has the duty to file its rates and to give notice of any change in such rates, the pipeline company does not thereby place its rates in issue. Only if the Commission elects to review such rates under Section 4 or Section 5 of the Natural Gas Act for "the protection of the public interest" are the Commission's costs of rate review ever incurred. Yet, the only basis for the Commission's imposition of such costs upon pipeline companies via the annual general charge is Title V which, read in conjunction with Budget Circular No. A-25, is clearly limited to recouping the cost of a service which "provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large" (Pet. App. 61a).

As the court of appeals noted (Pet. App. 9a, n. 10), this Court has made clear that the primary beneficiaries of the Natural Gas Act are not the pipelines but rather the ultimate consumers of natural gas. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610-12 (1944); *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378, 388-89 (1959). As stated in *Atlantic Refining*, "[t]he Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges" (360 U. S. at 388).

Similarly, justification for the Commission's annual reserves added assessment cannot be found in Title V and Budget Circular A-25. As noted above, its purpose is to recoup from pipeline companies the Commission's cost of processing certificate applications filed by independent producers seeking authority to sell gas for re-

sale in interstate commerce.[13] Budget Circular A-25 states that a reasonable charge should be made "to each identifiable recipient for a measurable unit . . . of Government service . . . from which he derives a special benefit" (Pet. App. 61a). Inasmuch as pipeline companies have been assessed filing and processing fees relating to their own certificate applications since 1966 (35 FPC 30), it would seem logical and consistent if the Commission were to assess independent producers for the cost of processing their own certificate applications.[14]

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[13] In the rulemaking proceeding culminating in the Commission's first application fee schedule (35 FPC 30), the Commission refused to charge applicant producers for the costs incurred in processing their certificate applications. Acting pursuant to Title V and Budget Circular No. A-25, the Commission explained its refusal as follows:

> "The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, *both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons*" (App. B, *infra*, p. 18a, emphasis added).

While noting unexplained "administrative difficulties", the Commission essentially viewed the producer certification process as involving its rate review function which it then considered to be "primarily for the benefit of the general public" (App. B, *infra*, p. 18a).

[14] In its Notice of Proposed Rulemaking (App. A, *infra*, p. 6a). the Commission cited "administrative convenience" as the reason for assessing pipeline companies rather than independent producers for the cost of processing the producers' certificate applications. Neither Title V nor Budget Circular A-25 suggest "administrative convenience" as a basis for the assessment of fees or charges.

Forsaking "administrative convenience" as the reason for assessing pipelines for the cost of processing producer certificate applications, the Commission finally referred to certain allegedly "clear benefits" accruing to pipelines from the producer certification process in its order denying rehearing of rulemaking Order 427 (Pet. App. 57a). The first "benefit" mentioned is control of the producers' initial prices through certificate conditions. As this Court made clear in *Atlantic Refining, supra,* a certificate condition affecting the initial price of an independent producer may be imposed when such price is "not in keeping with the public interest" as represented by the ultimate consumers of natural gas (360 U.S. 388-391). The other "clear benefits" include the expedition of gas deliveries to pipelines through issuance of temporary certificates to producers. As with each of the "benefits" listed, expedition of gas deliveries primarily benefits the ultimate consumers. This is particularly true at the present time when the demands for natural gas have outrun available supplies. *Area Rate Proceeding, et al. (Southern Louisiana Area)*, 46 FPC 86, 110-11, 113 (1971).

The Commission erroneously contends that the court below set aside the annual charges assessed against pipeline companies in the belief that "annual charges for regulating activities which benefit an entire industry may not be imposed" under Title V (Pet., p. 11). To the contrary, the court of appeals held that since these annual charges are designed to recoup the costs of regulatory activities performed "primarily for the benefit of the public", it is fundamentally wrong to impose such costs upon the pipeline companies (Pet. App. 9a-10a).

2. There is no conflict between the "approach" of the court below and the "approach" of the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States, supra.* The Federal Power Commission does concede that the nature of its regulation of the electric power and natural gas industries is "sufficiently different" from the FCC's regulation of broadcast licensees and cable television (CATV) operators involved in *Clay Broadcasting* as to make the decisions of the court below and the Fifth Circuit factually distinguishable (Pet., p. 16). However, the Commission erroneously contends that the "approaches" of the two courts are opposed because the Fifth Circuit recognized industry-wide benefits as a basis for annual fees under Title V whereas the court below set aside annual charges since "only industry-wide benefits are conferred" (Pet., p. 16). In so saying, the Commission simply ignores the holding of the court below that the Commission's annual charges are not authorized by Title V since they are imposed upon regulated companies to recoup the Commission's costs of regulatory activities performed "primarily for the benefit of the public" (Pet. App. 9a).

On the other hand, *Clay Broadcasting* involves the FCC's imposition of annual license fees upon broadcast licensees and CATV operators. In affirming these fees as authorized by Title V, the Fifth Circuit took careful note of the special benefits conferred upon broadcasters and CATV operators by the FCC's regulatory activities (Pet. App. 70a, 78a-79a).[15] Thus,

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[15] When Title V was being considered by Congress, one of its sponsors stressed the special benefits which accrue to broadcasters licensed by the Federal Communications Commission, 97 Cong. Rec. 4809 (1951).

it is readily apparent that the decision below and the *Clay Broadcasting* decision in no way conflict. Concededly distinguishable on their facts, each decision recognizes that Title V, as interpreted by Budget Circular A-25, authorizes a federal agency to impose a charge upon identifiable recipients for special benefits conferred. Each court, however, was obliged to determine within the confines of markedly different regulatory statutes whether certain regulatory activities conferred special benefits upon the particular companies against which the charges in question had been imposed. The fact that the FPC's annual charges were set aside by the court below and the FCC's annual license fees upheld by the Fifth Circuit only serves to highlight the differences between the nature and purpose of the regulatory activities performed under the particular regulatory statute involved. Consequently, the difference in result reached by the two courts cannot properly be attributed to a conflict in their approach under Title V.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1973

APPENDIX A

APPENDIX A

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[18 CFR, Parts 3, 32, 33, 34, 35, 36, 45, and 159]

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	Docket No. R-408

Notice of Proposed Rulemaking

(November 25, 1970)

Notice is hereby given, pursuant to Section 553 of Title 5 of the United States Code that the Commission is proposing to amend its general rules and regulations under the Federal Power Act and the Natural Gas Act to revise the schedules of fees at present imposed in connection with the filing of certain applications by natural gas companies under the Natural Gas Act and to establish new schedules of fees and annual charges to be applicable to electric utility companies and natural gas producers and pipelines.

Any interested person may submit to the Federal Power Commission, Washington, D.C., 20426, not later than December 18, 1970, data, views, comments, and suggestions, in writing, concerning all or part of the amendments proposed herein. An original and 14 conformed copies should be filed with the Secretary of the Commission. Submittals to the Commission should indicate the name, title, and mailing address of the person to whom communications concerning the proposal should be addressed, and whether

the person filing them requests a conference at the Federal Power Commission to discuss the proposed amendments. The Commission will consider all such written submittals before acting on the matters herein proposed.

Annual charges have long been assessed against licensees of hydroelectric projects pursuant to Congressional direction contained in Part I of the Federal Power Act to require payment *inter alia* by them "in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part;" and "for recompensing it for the use, occupancy, and enjoyment of its lands or other property. . .".[1]

Additionally, Congress has by statute vested authority in all agencies of the federal government to prescribe fees or charges for services conferring benefits on persons subject to their jurisdiction so as to render such agencies as fully self-sustaining as possible. The pertinent provision which is included in Title V of the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 USC 483a), reads as follows:

> It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person

[1] In addition, licensees and holders of permits affected by a determination by the Commission of headwater benefits are required to pay to the United States the cost of making such determination. Provisions for such payments appearing in Section 10(e) and (f) were contained in the original Federal Water Power Act, 41 Stat. 1063, approved June 10, 1920. Implementing regulations appear in Part II of the Commission's Regulations Under the Federal Power Act, 18 CFR 11.20 *et seq.*

(including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

Pursuant to such statute and to recommendations made at hearings before Congressional appropriation committees, we established by order our first schedule of fees (apart from those under Part I of the Federal Power Act) which were payable in connection with applications filed by natural gas pipeline companies for certificates of public convenience and necessity and for other authorizations as especially beneficial to the recipients of the services rendered in their processing. Order 317, 31 F.R. 430, January 13, 1966, as amended by FPC Order 317-A, 31 F.R. 4890,

March 24, 1966, Part 159 of the Commission's Regulations Under the Natural Gas Act, 18 CFR, Part 159.

Congressional appropriation committees have since requested further review of our fee schedules with a view to making increases or adjustments to offset in part the increasing needs for direct appropriations for agency operating expenses. S. Rept. No. 1375, 90th Cong., 2d Sess.; H. Rept. No. 1348, 90th Cong., 2d Sess. More recently, the Chairman of the Subcommittee on Independent Offices and Department of Housing and Urban Development of the Committee on Appropriations of the House of Representatives requested us to review our rate and fee structures with a view to charging gas and utility companies enough to sustain our administrative operations. Hearings, Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., Part 2, p. 951.

In compliance with the spirit of the 1952 Appropriation Act, Executive directives[2] and subsequent Committee recommendations, we have thoroughly reviewed the existing fee structure and the areas of our administrative operations which have not heretofore been subject to any charges. The fee schedules we propose to adopt have been prepared in the light thereof to meet the statutory objective of making the Commission "self-sustaining to the full extent possible", to recoup by way of payment into the Treasury of the United States the sums reasonably allocable to the estimated costs in FY 1971 of rendering the types of services performed by the Commission as reflected by costs experienced in FY 1970, and to allocate fees and charges

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[2] Circular No. A-25, issued September 23, 1959 by the Bureau of the Budget (now Office of Management and Budget), as subsequently amended, sets forth for agency action the scope of user charges activities, guidelines for carrying out the policies prescribed therein and required submission of periodic status reports.

as fairly and as equitably as practicable "taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ".

We propose no changes in the fee schedule relating to Part I of the Federal Power Act since the charges thereby generated substantially cover the cost of administering that part of the Act.[3]

Our order adopting fee schedules applicable to natural gas pipelines recognized that "neither our costs nor the dollar value of facilities will remain static" and that revision "may be necessary in the light of subsequent experience." The growing complexity of certificate proceedings and increases in costs incurred in administering the certificate programs requires a slight upward readjustment of the rates presently applicable if our operation of this activity is to remain self-sustaining. Accordingly, we propose to increase the amounts payable in connection with applications for certificates under Section 7(c) and (e) of the Natural Gas Act.

The remaining costs of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings. Our proposal to allocate estimated costs among jurisdictional companies on the basis of their relative amounts of natural gas delivered seems fair and equitable since their rates are subject to continued surveillance in addition to the complexity of the issues raised in the augmented number

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[3] FY 1970 collections for administering Part I of the Federal Power Act totalled $2,568,106 in contrast with actual costs of operations for that Part of $2,966,977 (exclusive of overhead expense and services to other agencies and the public). However, collections effected under Part I powers vested in the Commission totalled $5,337,703, of which $4,504,299 was paid into the Treasury.

of applications for rate increases which have surfaced in recent years.

We also propose to adopt a fee schedule which will return to the Treasury the costs of the producer certificate program based upon the annual commitments of new reserves to the pipelines for interstate deliveries. For reasons of administrative convenience these charges would be paid by the pipelines on the basis of new reserves reported as certificated during each reporting period. The pipelines will be able to recoup the amount of such payments from their customers as part of the costs upon which their rates and charges are based.

The proposed assessments and fees applicable to our functions under Parts II and III of the Federal Power Act are new. Our functions in carrying out the responsibilities imposed under those parts of the Federal Power Act confer benefits upon the recipients. The manner in which allocations should be made has been the subject of much study. We believe our proposals not only spread those costs fairly and equitably but that they are consistent with the legislative and executive mandates we are required to carry out.

The filing fees to be paid upon the filing of designated applications and rate schedules, other than for major rate increases, are in fixed amounts based upon average historic costs incurred in the administration of each of those functions. The sliding scale proposed for major rate increases based upon gross revenues represents, in our judgment, a fair and equitable method of providing for recovery of the average costs involved in the consideration and disposition of those items.

We have also proposed a formula to recoup the remaining costs of our regulatory program and those incurred in the administration of reliability functions by assessments based on revenues as reasonably representative of the value of

those services to such companies. We believe our activities in both areas of our operations provide special benefits to the companies subject to our jurisdiction that fully justify the scale of charges we propose to initiate.

Additional miscellaneous charges have been considered to cover costs incurred in connection with the location of file materials requested for inspection and/or copying. Under existing regulations fees are charged for copying pursuant to contract with a private company which provides that service. Moreover, about 75 percent of our searches for filed materials requires less than one-half hour for which charges would not be administratively feasible. In these circumstances, we believe that only a fee should be charged for certification of documents in the amount of $2.00 to cover the estimated cost thereof.

In developing these schedules we have endeavored to adhere to the guidelines contained in Budget Circular No. A-25 by the imposition of charges "to each identifiable recipient for a measurable unit or amount of Government service . . . from which he derives a special benefit." These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . . " or provides "more immediate or substantial gains or values . . . than those which accrue to the general public . . . " or provides business stability or assures public confidence in the business activity of the beneficiary . . . " or is "performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public . . . ".

Costs directly allocable to a specific type of service rendered to specifically identifiable persons would be effected by charges directly related to that specific service. In determining the amount thereof we are not required to keep cost records on a case-by-case basis but are authorized to average the costs involved in a particular serv-

ice. *Aeronautical Radio, Inc.* v. *United States,* 335 F.2d 304 (CA7, 1964), certiorari denied, 379 U.S. 966 (1965). Our remaining proposed charges being of benefit overall to the members of both industries would be assessed on a measure of size against those within the ambit of our jurisdictional activities.

The proposed amendments to the Commission's regulations would be issued under the authority granted by the Federal Power Act, particularly Section 309 (49 Stat. 858, 16 USC 825h) and the Natural Gas Act, particularly Section 16 (52 Stat. 830, 15 USC 717o).

A. The following are proposed amendments to Part 3, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations.

1. Amend the title of Part 3 by inserting the words "Miscellaneous Charges" immediately preceding the words "Ethical Standards". As so amended the title of Part 3 will read:

PART 3—ORGANIZATION; OPERATION; INFORMATION AND REQUESTS; MISCELLANEOUS CHARGES; ETHICAL STANDARDS.

2. Amend "§ 3.102 Public information, requests, and assistance" by revising the section title and by revising paragraph (b) to read as follows:

§ 3.102 Public information, requests, and assistance; miscellaneous charges.

* * * * *

(b) During the Commission's regular business hours, the public may examine in the Office of Public Information in Washington, D.C., copies of public information filed with the Commission. Photo copies of public material may be obtained through the public reference room. Fees charged for such copies are established by an annual contract between the Com-

mission and a private company which does the work. Current schedules of fees for copying work are available from the Office of Public Information. Except for requests made by government agencies certification of copies of any official Commission record shall be accompanied by a fee of two dollars. Inquiries and orders may be made to that office personally, by telephone, or by mail.

B. The following are proposed amendments to Subchapter B—Regulations under the Federal Power Act, Chapter I, Title 18 of the Code of Federal Regulations:

1. Revise the title of "Part 11—Annual Charges" to read as follows:

PART 11—ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

2. In "Part 32—Interconnection of Facilities; Emergencies; Transmission to Foreign Country.", revise the section titles and introductory clauses of §§ 32.1, 32.22, 32.51, to read as follows:

§ 32.1 Contents of application; filing fee.

Every application under section 202(b) of the Act shall be accompanied by the fee described in Part 36 of this Subchapter and shall set forth the following information:

* * * * *

§ 32.22 Application for permanent connection for emergency use; contents; form and style; filing fee; number of copies.

Application for Commission approval of a permanent connection for emergency use only shall be accompanied by the fee described in Part 36 of this Subchapter and shall conform with the requirements of §§ 32.1 to 32.4, inclusive, and, in addition, shall state

in full the reasons why such permanent connection for emergency use is necessary in the public interest.

§ 32.51 Contents of application; filing fee.

Every application shall be accompanied by the fee described in Part 36 of this Subchapter and shall set forth in the order indicated, the following:

• • • • •

3. In "Part 33—Application for Sale, Lease, or Other Disposition, Merger or Consolidation of Facilities, or for Purchase or Acquisition of Securities of a Public Utility", revise the title and introductory sentence of § 33.2 to read as follows:

§ 33.2 Contents of application; filing fee.

Each such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee described in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which should, insofar as possible, be furnished as to said applicant and each company whose facilities or securities are involved:

• • • • •

4. In "Part 34—Application for Authorization of the Issuance of Securities or the Assumption of Liabilities", revise the title and introductory sentence of § 34.2 to read as follows:

§ 34.2 Contents of application; filing fee.

Every such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee described in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which, in the case of the assumption of a liability, shall be furnished as to both the issuer and the person assuming liability:

• • • • •

5. In "Part 35—Filing of Rate Schedules", between the heading "Application" and "§ 35.1 Application; obligation to file rate schedules", insert a new "§ 35.0 Filing fees", which will read as follows:

§ 35.0 Filing fees.

Every filing made under this part shall be accompanied by the fee described in Part 36 of this Subchapter.

6. Immediately following Part 35, add a new "Part 36—Annual Charges and Fees" which will read as follows:

PART 36—ANNUAL CHARGES AND FEES UNDER PARTS II AND III OF THE FEDERAL POWER ACT

§ 36.1 Annual charges.

Reasonable annual charges shall be assessed by the Commission against each public utility to reimburse the United States for such costs of administration of Parts II and III of the Federal Power Act as hereinafter provided:

(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's public utility regulatory and interconnection and coordination programs from which shall be deducted the amounts reserved pursuant to the provisions of paragraph (c) of this section and section 36.2 of this part.

(b) For each calendar year terminating in such fiscal period the costs of administration determined under paragraph (a) of this section shall be assessed against each public utility in the proportion that the gross revenues of such public utility bear to the sum of the gross revenues of all public utilities for the like period.

(c) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

§ 36.2 Filing fees.

A filing fee in the amounts set forth below shall accompany each of the following:

(a) Applications for physical connections $150

(b) Applications for the construction of border facilities $150

(c) Other corporate applications authorized by these regulations under the Federal Power Act, except applications under Part I of the Federal Power Act, applications for authority to hold interlocking positions, and applications for the merger or consolidation of public utilities as provided in paragraph (d) of this section $500

(d) Applications for the merger or consolidation of Class A or Class B public utilities or any combination thereof $10,000

(e) Nominal rate schedule filings other than that involving rate increases $100

(1) Examples of such filings include schedule changes having minimal impact on the operations of a public utility such as those providing service to an additional delivery point, changes in maximum obligation to serve, changes in minimum billing demand not affecting billings, changes in service rules or regulations not affecting billings, extensions of terms of contracts or continuation of service, cancellation of

rate schedules where service is no longer needed, changes in delivery voltages or metering voltages, changes in contract provisions not affecting service, rates or billings, and adoption of initial rate schedules containing rates identical to rates applicable to the same customer class previously accepted for filing.

(f) Moderately complex rate schedule filings .. $500

(1) Examples of such filings include schedule changes presenting more complex administrative problems such as those involving interconnection agreements, pooling agreements and additional large-scale sales.

(g) Rate schedule filings involving nominal rate increases $500

(1) These include schedule changes involving increases in rates totalling less than $50,000.

(h) Rate schedule filings involving rate increases other than covered under paragraph (g) of this section, as follows.

1 percent of the amount of such increases up to but not exceeding $1 million;

$10,000 plus ½ percent of the amount of such increases in excess of $1 million and not exceeding $10 million;

$55,000 plus ¼ percent of the amount of such increases in excess of $10 million.

(i) Applications to hold interlocking positions $100

§ 36.3 Miscellaneous

Annual assessments and fee payments shall be made by check or money order to the Treasurer of the United States. No fees will be refunded.

§ 36.4 Accounting for fees paid pursuant to this part.

A public utility subject to the provisions of this part shall account for the assessments and fees paid by charging the amounts thereof to Account 928, Regulatory commission expenses.

7. In "Part 45—Application for Authority to Hold Interlocking Positions", revise the title and introductory clause of § 45.8 to read as follows:

§ 45.8 Contents of application; filing fee.

Each application shall be accompanied by the fee described in Part 36 of this Subchapter and shall state the following:

• • • • •

B. The following are proposed amendments to Part 159, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18 of the Code of Federal Regulations:

1. In § 159.2 Applications involving construction or acquisition of facilities, revise paragraphs (a), (b) and (d) to read as follows:

§ 159.2 Applications involving construction or acquisition of facilities.

• • • • •

(a) Within 30 days following issuance of notice of application, an amount equal to 65/1000 of 1 percent (0.00065) of the estimated cost of construction of new facilities or of facilities to be acquired;

(b) Within 30 days following grant of the certificate, an amount equal to 130/1000 of 1 percent

(0.00130) of the estimated cost of construction of new facilities or of facilities to be acquired, unless applicant does not accept the certificate.

* * * * *

(d) If the actual cost of construction of new facilities or of facilities to be acquired exceeds the estimated cost thereof, the statement of actual cost, required to be submitted by § 157.20(c)(4) and (d)(3) of this chapter, shall be accompanied by an amount equal to 195/1000 of 1 percent (0.00195) of the excess of actual cost (plus estimated cost of facilities for which actual cost is not then recorded on the books of applicant) above estimated cost.

* * * * *

2. Immediately following § 159.2, insert a new "§ 159.2a Costs administration" which will read as follows:

§ 159.2a Costs of administration.

Reasonable annual charges will be assessed by the Commission against natural gas companies to reimburse the United States for costs of administration of the Natural Gas Act, as follows:

(a) A determination shall be made for each fiscal year of the costs of administration of the natural gas pipeline programs from which shall be deducted the amounts received pursuant to the provisions of sections 159.1 and 159.2 of this Part.

(b) For each calendar year terminating in such fiscal period the costs of administration determined under paragraph (a) of this section shall be assessed against each Class A and Class B natural gas company in the proportion that the total gas deliveries of such natural gas company bear to the sum of the total gas deliveries of all Class A and Class B natural gas companies for the like period.

(c) In addition to the annual charges prescribed by paragraphs (a) and (b) of this section, each natural gas company required to file an Annual Report - Total Gas Supply on FPC Form No. 15 shall be assessed one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form.

(d) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

3. In "§ 159.3 Miscellaneous", revise paragraph (a) to read as follows:

§ 159.3 Miscellaneous.

(a) *Method of Payment.* Annual assessments and fee payments shall be made by check or money order payable to the Treasurer of the United States. No fees will be refunded.

The Secretary shall cause prompt publication of this notice to be made in the Federal Register.

By direction of the Commission.

GORDON M. GRANT,
Secretary.

APPENDIX B

APPENDIX S

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-282

ESTABLISHMENT OF FEES TO BE PAID BY APPLICANTS FOR NATURAL GAS PIPELINE COMPANY CERTIFICATES AND OTHER AUTHORIZATIONS

Notice of Proposed Rulemaking

(18 CFR, Parts 152, 153, 156, 157, 159)

(Issued September 15, 1965)

1. Pursuant to section 4 of the Administrative Procedure Act the Commission gives notice that it proposes to establish a schedule of filing fees relating to applications by natural gas pipeline companies for certificates of public convenience and necessity as well as applications for exemption under section 1(c) of the Natural Gas Act, for export or import authority, for an order directing a pipeline company to serve a local distributor or for abandonment authority.

2. Congress has established the policy "that any * * * benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared or issued by any Federal agency * * * to or for any person * * *, except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible". Independent Offices Appropriation Act of 1952, 5 U.S.C. 140. In order to accomplish this objective, Congress authorized the head of each agency, which includes the Federal Power Commission, to prescribe by regulation such fees and charges as are determined to be fair and equitable "taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other

pertinent facts." Congress also provided that the regulations prescribed by agencies in the Executive branch shall be as uniform as practicable and subject to such policies as the President may prescribe. The Bureau of the Budget on behalf of the President has issued Circular No. A-25, September 23, 1959, which sets forth general policies for developing an equitable and uniform system of charges for certain Government services and property so as to implement the provisions of the Independent Offices Appropriation Act of 1952.

3. The regulatory activities of the Federal Power Commission convey special benefits to identifiable recipients above and beyond those which accrue to the public at large. Congress has adopted the policy that the recipient of special benefits conveyed by a Federal agency program should pay a reasonable charge to defray the cost of the program and to relieve the general taxpayer who bears the major burden of supporting Federal agencies. The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies. The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons. The Commission already assesses charges against hydroelectric licensees for the purpose of defraying the costs of administration of Part I of the Federal Power Act (16 U.S.C. 803(e)).

However, we believe the public interest would be served by the establishment of a fair and equitable schedule of fees designed to recover our costs for the services rendered in processing applications for the certificating of interstate transportation and sale of natural gas for resale by pipeline companies and the other matters enumerated. We propose that all qualifying applicants pay a nominal filing fee of $50. In addition, we propose that applicants for authority to construct facilities for the transportation of gas pay a fee amounting to five one-hundredths of one percent of the estimated cost of the facilities for which a certicate is requested, payable at the time of filing, plus a fee of ten one-hundredths of one percent of the estimated cost of the facilities for which a certificate is granted and accepted.

The proposed fees are based upon the Commission's cost of conducting this function, the number of filings in this category and the estimated costs of the facilities for which application was made in recent years. We recognize that neither the Commission's costs nor the dollar value of facilities will remain static and, therefore, that it may be necessary to revise either the $50 fee or the percentage factors or both in the light of subsequent experience.

Finally, we are proposing the accounting to be followed by the companies in recording on their books the fee payments being proposed herein, that the companies charge Account 302, Franchises and Consents, with appropriate amortization, for the amounts of user charges paid by them if they are successful in obtaining certificates, and if the certificate is not granted, that the amounts expended be charged to Account 928, Regulatory Commission Expenses. Since a portion of the user charges will be assessed against the companies at the time the application is filed, we propose that the companies include the initial amounts paid in Account 186, Miscellaneous Deferred Debits, and clear that account to either Account 302 or

928 when final disposition is made of the application by the Commission.

4. Pursuant to section 4 of the Administrative Procedure Act and § 1.19(a) of the Commission's rules (18 CFR 1.19(a)), any interested person may submit to the Federal Power Commission by November 5, 1965, data, views, and comments in writing concerning the amendments now being proposed herein. The Commission will consider these written submittals before taking any action upon the proposed amendments. An original and nine copies of any such submittals should be filed.

5. These amendments to the Commission's Regulations Under the Natural Gas Act (18 CFR, Chapter I, Subchapter E) are proposed to be issued under the authority of the Natural Gas Act, as amended, particularly sections 1(c), 3, 7, 8 and 16 thereof (52 Stat. 822, 824, 825, 830; 56 Stat. 83; 68 Stat. 36; 15 U.S.C. 717(c), 717(b), 717f, 717g, 717o); Executive Order 10485 (18 F.R. 5397; 3 CFR, 1949-53 Comp. 970); section 5 of the Outer Continental Shelf Lands Act (67 Stat. 462, 464; 43 U.S.C. 1334 (c)); section 140 of Title 5 of the U. S. Code; and Budget Bureau Circular A-25 (September 23, 1959).

6. In consideration of the foregoing, the Commission proposes to amend Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations as follows:

a. Amend Subchapter E by adding a new Part 159 to read as follows:

"Part 159—Filing Fees

§ 159.1 Filing fees for applications not involving construction of facilities.

A filing fee of $50 shall accompany each of the following:

(a) Applications for exemption under section 1(c) of the Act;

(b) Applications to import or export natural gas under section 3 of the Act;

(c) Applications for a permit to maintain facilities at the borders of the United States under E. O. 10485;

(d) Applications and petitions to intervene requesting orders under section 7(a) of the Act;

(e) Applications for authority to abandon under section 7(b) of the Act;

(f) Applications under sections 7(c) and (d) of the Act for certificates of public convenience and necessity;

(g) Applications for a determination by the Commission pursuant to section 5 of the Outer Continental Shelf Lands Act;

(h) Amendments to any of the applications listed in (a) through (g) hereof.

§ 159.2 Filing fees for applications and amendments involving the construction of facilities.

In addition to the fees prescribed by § 159.1, applicants for a certificate of public convenience and necessity under sections 7(c) and (d) of the Act to construct and operate facilities shall pay the following fees:

(a) Within 30 days following the issuance of Notice of Application, an amount equal to 5/100 of one percent (i.e., 0.0005) of the estimated cost of construction of new facilities;

(b) Within 30 days following the grant of the certificate, an amount equal to 10/100 of one percent (i.e., 0.001) of the estimated cost of the facilities;

(c) If an amendment to a pending application increases the total cost of the facilities for which a

certificate is requested, an additional amount, computed with respect to the increase as provided in paragraph (a) hereof, shall be paid;

(d) If, upon completion of the facilities authorized, the actual cost thereof exceeds the estimated cost, the statement of actual cost, required to be submitted by § 157.20(c)(4) of this chapter, shall be accompanied by an amount equal to 15/100 of one percent of the excess of actual cost above estimated cost.

§ 159.3 Miscellaneous.

(a) *Method of payment.* Fee payments shall be by certified check or money order payable to the Treasurer of the United States. No fees will be refunded. All fees collected will be paid into the United States Treasury as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriation Act of 1952 (5 U.S.C. 140).

(b) *Exemption.* The provisions of this part shall not apply to independent producers, as defined in these regulations.

(c) *Amendments to outstanding certificates.* Applications to amend outstanding certificates, authorizations or orders will be treated as an initial application for the purposes of this part.

§ 159.4 Accounting for fees paid pursuant to Part 159.

A natural gas company subject to the provisions of this part shall account for the fees paid as follows: Pending Commission action on certificate and other applications, amounts paid when an application is noticed shall be charged to Account 186, Miscellaneous Deferred Debits, and held in suspense until the application is either issued or denied. Upon grant of

a certificate or other order by the Commission, the amount suspended in Account 186 and the additional charges then due shall be charged to Account 302, Franchises and Consents, with appropriate amortization, with a separate record maintained for each transaction. If the application is denied, the amount suspended in Account 186 shall be charged to Account 928, Regulatory Commission Expenses, in the year the application is denied.

* * *

b. Appropriate technical amendments to Parts 152, 153, 156 and 157 incorporating therein, by reference, the requirements of Part 159."

By direction of the Commission.

GORDON M. GRANT,
Acting Secretary.

COURT, U. S.

APR 13 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1162

FEDERAL POWER COMMISSION, *Petitioner*

v.

NEW ENGLAND POWER COMPANY, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

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April 13, 1973

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF FACTS	3
ARGUMENT	8
CONCLUSION	18

CASES CITED

Atlanta Refining Co. v. *Public Service Commission of New York*, 360 U.S. 137 (1960) 8

Clay Broadcasting Corp. v. *United States*, 464 F.2d 1313, pending on petition for a writ of certiorari, *sub nom.*, *National Cable Television Association* v. *U.S.*, No. 72-948 ..... 8, 15, 16 17,

F.P.C. v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) .8, 9, 14

F.P.C. v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1922) 14

Fort Smith Gas Company v. *Wiseman*, 189 Ark. 675, 74 S.W. 2d 788 (1934) 10

Memphis Natural Gas Company v. *McCanless*, 183 Tenn. 635, 194 S.W. 2d 476 (1946), appeal dismissed, 239 U.S. 670 (1946) 10

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) .. 8

Phillips Petroleum ompany v. *State of Wisconsin*, 347 U.S. 672 (1954) 8

U.S. v. *RCA*, 358 U.S. 334 (1959) 12

U.S. v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) .. 13, 17

STATUTES

	Page
Federal Power Act, 16 U.S.C. 791 *et seq.*	2
Section 10(e)	9
Independent Offices Appropriations Act for the Year Ending June 30, 1952, 65 Stat. 290, 31 U.S.C. 483a: Title V	*passim*
Natural Gas Act, 15 U.S.C. 717, *et seq.*: Section 16	9

MISCELLANEOUS

Amendment of Subpart G of Part 1 of FCC's Rules Relating to Schedule of Fees, 23 F.C.C. 2d 880 (1970), 28 F.C.C. 2d 139 (1971)	16, 17
Bureau of the Budget Circular A-25, Sept. 23, 1959	4, 5, 9, 11, 12, 13
Compilation entitled State Utility Commission, Subcommittee on Intergovernmental Relations of the Senate Committee on Operations, 90th Cong., 1st Sess.	10
97 Cong. Rec. 4809 (1951)	9
FPC Order No. 317 issued January 5, 1966, 35 F.P.C. 30 (1966)	4
FPC Regulations Under the Natural Gas Act: Section 159.1	4
Section 159.2	4
30 Fed. Reg. 12077 (1965)	6
H. Rep. No. 384, 82nd Cong., 1st Sess. (1951)	9
H. Rep. No. 1348, 90th Cong., 1st Sess. (1969)	13
S. Rep. 1375, 90th Cong., 1st Sess. (1969)	13
S. Rep. No. 2120, 81st Cong., 2d Sess. (1951)	9

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BRIEF IN OPPOSITION OF TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 1a-13a) is reported at 467 F.2d 425. The initial order (No. 427) of the Federal Power Commission (Pet. App., pp. 18a-50a) and its order denying rehearing

(Pet. App., pp. 51a-60a) are reported at 45 F.P.C. 440 and 45 F.P.C. 964, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1972 (Pet. App., pp. 14a-15a), and the Commission's petition for rehearing was denied on September 25, 1972 (Pet. App., 16a-17a). By orders of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to and including February 22, 1973. The petition for a writ of certiorari was filed on February 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the activities of the Federal Power Commission (1) in discharging the accounting and rate regulation responsibilities imposed upon it by the Natural Gas Act over pipeline companies selling natural gas for resale in interstate commerce and (2) in processing applications of producers of natural gas for authorization to sell gas to such pipeline companies result in "things of value or utility" to such pipeline companies [1] within Title V of the Independent Office Appropriations Act, 1952, so as to authorize the Commission to recover the costs incurred by it in discharg-

[1] Petitioner would also bring before the Court a comparable question with regard to certain annual charges which the Commission undertook to assess against electric utilities subject to regulation under the Federal Power Act, 16 U.S.C. 791, *et seq.* This question is treated in the separate brief in opposition being filed by New England Power Company.

ing these responsibilities through the assessment of annual charges against the pipeline companies.[2]

STATUTE INVOLVED

The provisions of Title V of the Independent Office Appropriations Act of 1952 are set out in the Petition at pp. 2-3.

STATEMENT OF FACTS

By Notice of Proposed Rulemaking issued November 5, 1970 (J.A. 1-16)[3] the Federal Power Commission (Commission) proposed to assess a "general annual charge" against all natural gas pipeline companies with annual gas operating revenues in excess of $1,000,000 subject to its jurisdiction under the Natural Gas Act.[4] This charge was designed to reimburse the Commission for its costs in regulating pipeline rates under that Act. The amount of the charges to be assessed each year against each pipeline company was to be determined by subtracting the amounts collected by the Commission in filing fees specified in a separate schedule[5] from the Commission's total costs of admin-

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[2] The question as stated in the Commission's petition (at p. 2) assumes that these Commission activities result in specific benefits to the pipeline companies within Title V. As indicated in the Question Presented set out in the text, that assumption is improper since it assumes the answer to the actual question involved.

[3] "J. A." refers to the Joint Appendix printed in the court of appeals.

[4] Respondent, Tennessee Gas Pipeline Company, a Division of Tenneco Inc. is a natural gas pipeline company subject to Commission regulation under the Natural Gas Act and has the requisite revenues.

[5] The Commission had earlier prescribed a specific schedule of fees in connection with the filing by pipelines of applications for various licenses, permits and sanctions required under the Natural

istering its natural gas pipeline programs under the Natural Gas Act in that year, and assessing the remainder among the pipeline companies in proportion to their total deliveries of natural gas in interstate commerce in that year.

By this Notice, the Commission also proposed to assess an "added reserve fee" against each pipeline company which was "required to file an Annual Report—Total Gas Supply on FPC Form No. 15" (J.A. p. 16) This fee was to be based on "one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form." (J.A. p. 16) and purportedly was designed to recover the Commission's costs of processing applications filed by producers of natural gas for authority to sell gas to the pipeline companies (J. A. pp. 5-6).

Citing Title V of the Independent Offices Appropriations Act, 1952 (Pet. pp. 2-3) and Bureau of the Budget Circular A-25 (Pet. App. pp. 61a-62a) [6] as authority for these proposed charges, the Commission's Notice explained its reasoning underlying the proposed general annual charge as follows (J. A. p. 5):

Gas Act. (See Sections 159.1 and 159.2 of the Commission's Regulations Under the Natural Gas Act, originally adopted by Order 317 issued on January 5, 1966, 35 F.P.C. 30, 392, (1966). Its Notice of Proposed Rulemaking also proposed to increase these fees (See J.A. pp. 14-15). There is no question here as to the validity of these fees either as originally adopted or as here increased by the Commission.

[6] Circular A-25 is dated September 23, 1959 and was issued by the Bureau of the Budget pursuant to Title V's directive that steps be taken to assure that the fees assessed under that Title by the various Government agencies "be as uniform as practicable and subject to such policies as the President may prescribe."

> "The * * * costs [remaining after deduction of the filing fees] of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings.[7]

Following the submission of written comments by interested industry associations and companies, including Tennessee, the Commission on March 18, 1971, issued Order No. 427 adopting the proposed annual charges with several modifications not now relevant.[8] Holding that the assessment of the general annual charge came within its authority under Title V of the 1952 Appropriations Act and the criteria provided in Circular A-25, the Commission stated (Pet. App., pp. 30a-31a):

> "We recognize that the exercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or

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[7] With regard to the "added reserves fee", the Commission observed (J. A. p. 5):

> "We also propose to adopt a fee schedule which will return to the Treasury the costs of the producer certificate program based upon the annual commitments of new reserves to the pipelines for interstate deliveries. For reasons of administrative convenience these charges would be paid by the pipelines on the basis of new reserves reported as certificated during each reporting period."

[8] Among these changes was a change in the basis for determining each pipeline's share of the total to be recouped by the general annual charge. Whereas the Commission originally proposed the allocation to be on the basis of each company's total interstate deliveries, the Commission now proposed to make the allocation on the basis of each company's total jurisdictional deliveries. This change had the effect of unreasonably and arbitrarily imposing a greater proportion of these costs upon these pipelines, such as Tennessee, the bulk of whose natural gas pipeline business is for resale rather than for direct use or consumption.

> preferential and prejudicial has provided continuing benefit to consumers, but our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands."

Thereafter, applications for rehearing were filed (J. A. 120-126, 132-136), pointing out, *inter alia*, that in a earlier proceeding fixing a schedule of pipeline application fees, the Commission had acknowledged that it lacked authority to prescribe annual charges designed to recover the annual costs of pipeline rate regulation, since "these activities are primarily for the benefit of the general public rather than the regulated companies" (See J.A. p. 121; see also 30 Fed. Reg. 12077). However, in its order denying rehearing issued May 14, 1971 (Pet. App. 51a-60a), the Commission dismissed this statement as dictum and held instead that its authority under Title V to assess fees extended to the assessment of the proposed general annual charges since they are

> "* * * predicated on the benefits accorded public utilities and natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress which in our opinion satisfy the statutory requirements for the imposition of these charges." (Pet. App. p. 57a) [9]

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[9] Continuing, the Commission reaffirmed its assessment of the "added reserve fee" against the pipelines stating (Pet. App. p. 57a):

> "The assessment is limited to only one of the various producer programs: the certification of producer sales which plainly

On appeal, the court of appeals set aside both general annual charges and the added reserve fees. The court pointed out that the Commission's accounting and rate regulation of natural gas pipelines

> "* * * was primarily for the benefit of the public. Their charter statutes require them to so act. The courts have so held (fn. omitted). There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefiting the general public should come from the general fund of the treasury." (Pet. App. pp. 9a-10a).

Further, the court noted that the Commission's claim that the pipelines had benefited within Circular A-25 by virtue of the creation of a favorable "economic climate"

> "* * * missed the point. The creation of an 'economic climate' is not a special service nor is a particular pipeline or gas company the 'special beneficiary' of such a climate any more than any other pipeline, gas company or *the consumer in general.*" (Pet. App. 9a) [10]

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benefit pipelines through the Commission's control of the initial prices they are required to pay producers for gas purchases. The Commission's activities in this connection which provide clear benefits to pipelines through regulatory action include the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines."

[10] Emphasis supplied throughout unless otherwise noted.

ARGUMENT

Since, as this Court has repeatedly held, the primary purpose of the Natural Gas Act is to protect the ultimate consumers from being charged excessive rates by the pipeline companies, the Commission's discharge of these responsibilities patently does not result in "things of value or utility" within Title V of the 1952 Appropriation Act to the pipelines so regulated, either individually, or collectively as the pipeline industry. Accordingly, the court of appeals was clearly correct in holding that the Commission had no authority under Title V to seek to recover from the pipelines the costs incurred by it in discharging these responsibilities. Moreover, since this holding is limited to the specific Power Commission charges involved in this proceeding, the judgment of the court of appeals does not raise a question of general importance and does not conflict with that of the Fifth Circuit, sustaining certain fees imposed by the Federal Communications Commission, in *Clay Broadcasting Corp.* v. *U.S.*, 464 F.2d 1313, pending on petition for a writ of certiorari, *sub nom, National Cable Television Assn.* v. *U.S.*, No. 72-948.

1. It has long been settled, and, repeatedly reaffirmed by this Court, that Congress imposed upon the FPC the responsibility of "passing upon pipeline rate filings" (*supra* p. 5; J.A. p. 5) in order to protect the ultimate consumers against excessive rates. See, *e.g.*, *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954); *Atlantic Refining Co.* v. *New York Public Service Commission*, 360 U.S. 137 (1960); *Permian Basin Area Rate Cases* 390 U.S. 747 (1968). Thus, in *Hope*, the Court expressly pointed out that Congress had addressed the Natural Gas Act to "specific evils"

disclosed by the Federal Trade Commission investigation (320 U.S. at 610);[11] ruled that "the fixing of 'just and reasonable' rates (§ 4) with the powers attendant thereto (fn. omitted) was the heart of the new regulatory system." (*Id.* at 611); and concluded that "those provisions were plainly designed to protect the consumer interests against exploitation at the hand of private natural gas companies" (*Id.* at 612).

In claiming that Title V authorizes it to assess the costs incurred in discharging these responsibilities against the pipeline companies subject to such regulation,[12] the FPC apparently would read into Title V a general authorization to recover its costs of administration against the companies subject to its regulation. To be sure, there are statutes authorizing the assessment of such charges. For example, Section 10(e) of Part I of the Federal Power Act, 16 U.S.C. 803(e) expressly authorizes the Commission to require licensees under that Act to "pay * * * reasonable annual charges * * * for the purpose of reimbursing the United States for the costs of administration of this Part * * *" Similarly, several state legislatures have authorized their local regulatory agencies to assess against the companies subject to their regulation the costs of administration either on a fixed-fee basis for

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[11] Among the "specific evils" there noted was that "state commissions found it difficult or impossible to discover what it cost interstate pipe line companies to deliver gas within the consuming state; and thus they were thwarted in local regulation." (See 320 U.S. at 610)

[12] The Commission apparently has abandoned its claim, asserted in the court of appeals, that Section 16 of the Natural Gas Act also provided the requisite authority (See Pet. App., pp. 11a-13a).

specific services or as a percentage of some measure of size or value.[13]

However, Title V patently does not extend to the assessment of such general costs of administration. To the contrary, Title V, on its face, authorizes the assessment of fees only when the government agency involved furnishes something specific and identifiable, *i.e.*, "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit certificate, registration or similar thing of value or utility" to a specific identifiable beneficiary as distinguished from the public generally.

That the fees authorized by Title V were intended to be so limited is clear from its legislative history. Thus, the House Appropriations Committee explained that it was recommending the proposed legislation because "the government is not receiving full return from *many of the services which it renders to special beneficiaries.*" H. Rep. No. 384, 82nd Cong., 1st Sess., p. 2 (1951); see also, S. Rep. No. 2120, 81st Cong., 2nd Sess. (1950). Congressman Yates, a Committee member, elaborated on the House floor (97 Cong. Rec. 4809 (1951)):

> "The Federal Communications Commission grants franchises, licenses, certificates of convenience and necessity, if you will, to all broadcasting stations upon application for such licenses,

[13] See compilation in Committee Print entitled, *State Utility Commissions*, Subcommittee on Intergovernmental Relations of the Senate Committee on Operations, 90th Cong., 1st Sess., p. 22. See also *Memphis Natural Gas Company* v. *McCanless*, 183 Tenn. 635, 194 S.W. 2d 476, 481-482 (1946), appeal dismissed, 329 U.S. 670 (1946); *Fort Smith Gas Company* v. *Wiseman*, 189 Ark. 675, 74 S.W. 2d 788, 790 (1934).

> franchises, and certificates. * * * That is a pretty difficult job and a complicated job, and entails extensive hearings by the Federal Communications Commission. * * * The companies pay nothing other than taxes, and I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, that it should pay some of the costs of the hearings. * * * Such companies should assume a greater share of the cost because regulation is necessary."

Likewise, the Bureau of the Budget, in its Circular A-25 has taken a similarly limited view as to the charges authorized by Title V. As a result, the assessment of the proposed general annual charges here involved clearly is at odds with the provisions of that Circular. Thus, these charges do not come within the Circular's statement of General Policy, providing that fees may be charged "to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit" (Pet. App. p. 61a). Nor does the Commission's rate regulation activities provide "special benefits" to the pipelines "above and beyond those which accrue to the public at large." (*Ibid*). The absence of any such "special benefits" is highlighted by the fact that the sole criterion for collecting the charge from a pipeline in any year is that its revenues in that year exceed the prescribed minimum without regard to whether the pipeline itself was involved in any Commission proceeding in that year.

The assessment of such costs against the pipelines violates the subparagraph (2) of Circular A-25, prohibiting the assessment of charges "for service when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefiting broadly the general public * * *" (Pet. App. 62a). As already indicated the principal, if not the sole, identifiable beneficiaries from the Commission's discharge of its rate regulation responsibilities are the consuming public generally.

There is no merit in the Commission's claim (Pet. pp. 9-10), that the proposed general annual charges are authorized under Circular A-25 because, although its rate regulation benefits the consuming public, it also

> "* * * redounded to the benefit of [the natural gas] industr[y] by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands."

To be sure, Circular A-25 refers to "business stability", but it is in the context of specific agency actions directed to identifiable beneficiaries "(*e.g.* certificate of necessity and convenience for airline routes or safety inspection of craft)" (See Pet. App. pp. 61a-62a). The Commission order here involved also contains a schedule of fees to be paid in connection with requests for comparable Commission actions (*i.e.* applications for certification of public convenience and necessity under the Act) and there is no question here as to the validity of these fees.

In contrast, the alleged beneficial "economic climate"[14] was not the result of specific actions taken by the Commission with that objective in mind as contemplated by Circular A-25. Rather, that "climate" at best came about as the culmination of the Commission's activities over a period of years and resulted from the reaction of the financial community to the Commission's discharge generally of the responsibilities imposed on it by the Congress. Moreover, even if the Commission rate regulation has been beneficial generally to the natural-gas pipelines, the pipelines have not been "special", or even the primary, beneficiaries of that regulation. In light of the primary thrust of the statute, any benefits to the natural-gas pipelines would at most be incidental by-products of the Commission's discharge of its responsibilities to the consuming public.[15]

Finally, no special benefits resulted to the pipelines justifying the Commission's assessment of the

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[14] The finding of such beneficial "economic climate" is itself questionable since it is based solely upon a report issued by the Commission in 1950, more than 20 years ago (See Pet. App. 30a-31a, fn. 5).

[15] The recent urgings of the Appropriations Committees of Congress, that the regulatory agencies, including the FPC, review and increase their fees to offset in part increased operating costs (See Pet. pp. 6-7) obviously does not serve to enlarge the Commission's authority under Title V, in the absence of any affirmative Congressional action *Cf. U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) and cases there cited. In any case, the Committees' urgings were directed not to the assessment of charges such as the general annual charges here involved, but rather, to the increasing of fees for "services * * * rendered to special beneficiaries" and "beneficial certificates and privileges granted" See *e.g.*, H. Rep. No. 1348, 90th, 2nd Sess. p. 4; S. Rep. No. 1375, 90th Cong., 2d Sess. p. 3.

added reserve fee.[16] To the contrary, each of the "benefits" allegedly accruing to the pipelines as a result of the Commission's producer certificate activities is in fact intended to benefit the consuming public rather than the pipeline industry. Under the cost-of-service method used by the Commission in fixing pipeline rates subject to its jurisdiction (*cf. e.g., F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1955)), pipelines are required to pass on, rather than retain for themselves, the benefits which the Commission (Pet. App. 57a) claims results from its regulation of "initial prices [the pipelines] are required to pay producers for gas purchases," and "the elimination of indefinite price escalation provisions."

The further "benefits" allegedly stemming from "the [Commission] issuance of temporary certificates to expedite deliveries, * * * and the [Commission] control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines," (Pet. App. 57a) are also tied in with and are a part of benefits which those Commission activities are intended to provide the consuming public. The basic purpose of this facet of the Commission activities is to assure that gas will be available to satisfy the requirements of the consuming public generally. *Cf. F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S., 621 (1972). Whatever benefits result to pipeline industry from these Commission activities are merely incidental by-products and fall far short of constituting "spe-

[16] The "administrative convenience" justification set forth in the Commission's Notice of Rulemaking (J. A. p. 5), obviously is not an adequate basis for assessing the added reserves fee against the pipelines rather than the producers.

cial benefits above and beyond those which apply to the public at large" within Circular A-25.

2. There is no conflict between the holding of the Court below and that of the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States, supra.* To the contrary, both the Court below and the Fifth Circuit were in full agreement as to the need of special benefits to identifiable beneficiaries as a prerequisite to the assessment of any fees or charges, annual or otherwise, under Title V. Compare Pet. App. 5a-7a with Pet. App. 78a-81a. The Commission implicitly admits such to be the case but claims that the difference in a result reached by the two courts is attributable to "the approaches of the two courts in applying Title V [which] are diametrically opposed." (Pet. p. 16)

In so urging, the Commission would read the opinion of the Court below as setting the annual charges aside on the ground that the Commission's rate regulation resulted only in industry wide, rather than individual pipeline, benefits, whereas, according to the Commission, the Fifth Circuit held that industry-wide benefits were sufficient to satisfy Title V (Pet. p. 16).[17] But this alleged "difference in approach" does not exist; the distinction here pressed by the Government in fact did not constitute any part of the judgment or holding of either court of appeals.

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[17] But see the FCC's Brief in Opposition in No. 72-948 (at p. 10):

> "As the court stated, the inquiry under [Title V] is not whether those regulated agree with the regulators, but rather 'whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission' (Pet. App. A-18)."

The Court's ruling here was simply that the primary beneficiaries of the Commission's accounting and rate regulatory activities were the consuming public, and hence that the natural gas pipelines, neither individually nor collectively as an industry, received the "special benefits" required by Title V to justify the imposition of the proposed annual charges (Pet. pp. 9a-10a):

> "In sum, we conclude that the regulation of these industries is primarily for the benefit of the public * * *. There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public."

This approach is not opposed, diametrically or otherwise, to that of the Fifth Circuit. Like that of the Court below, the Fifth Circuit's holding was in no way predicated by any distinction between industry v. individual company benefits. Moreover, the nature of the FPC's rate regulation of the pipeline industry differ so markedly from the FCC's regulation of the broadcast and CATV industries as to make not only "detailed comparison of the [alleged] respective benefits bestowed by the different regulatory agencies difficult" as the FPC admits (Pet. p. 16), but also to make the different results reached by the two courts wholly consistent with each other.

Unlike the FPC's annual general charge have involved which, as shown earlier, is intended to cover its costs of rate regulation directed at protecting the ultimate consumers against excessive rates, the FCC annual charges involved in *Clay Broadcasting* are unrelated to any rate regulatory responsibilities the FCC may have under the Federal Communications Act. See Amendment of Subpart G of Part 1 of the FCC relat-

ing to Schedule of Fees, FCC Docket No. 18802, 23 FCC 2d 880 (1970), 28 FCC 2d 139, (1971). Indeed, since CATV is not "common carrier" under Title II of the Communications Act (*U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 172 (1968)), CATV operators apparently are "free to set their own advertising rates" *Cf. U.S.* v. *RCA*, 358 U.S. 334, 349 (1959).

Furthermore, one of the primary purposes of FCC regulation of broadcasting and CATV activities is to allocate the limited air waves and broadcast spectrum among the various applicants for license and to protect those having such licenses from interference by others. See *e.g.*, 23 F.C.C.2d at 890, 897-898, 28 F.C.C. 2d pp. 142-143, 150-151. Although the FCC's guideline in so acting is the "public interest", the Government (Pet. pp. 15-16; see also Br. in Opp. in No. 72-948 at pp. 7-8) urges that the Fifth Circuit properly held that such FCC regulation is highly and directly beneficial to broadcasters and CATV systems:

> "* * * Broadcasters receive the right to operate on a portion of the public's electromagnetic spectrum, are protected against technical interference and are part of a FCC controlled market structure which permits them to operate at a profit (App. G, *infra*, p. 70a). CATV operators, of course, use the broadcast signals protected and licensed by the FCC and the relative scarcity of television outlets creates much of the economic value of CATV systems; the systems are also benefited by FCC rules restricting the ownership of CATV systems by television stations and networks and stand to benefit from proposed rules which would limit the amount of franchise fees which local governments could charge CATV operators (*Id.* at 78a-79a)."

Since these valuable benefits are continuing in nature, the assessment of an annual charge, such as that assessed by the FCC upon CATV operators on the basis of the number of their subscribers, plainly is so different from the FPC's general annual charge intended to recover its rate regulation costs as to render the result reached by the Court below not inconsistent with that of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1973

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FEDERAL POWER COMMISSION, PETITIONER

v.

NEW ENGLAND POWER COMPANY, ET AL.

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INDEX

	Page
Relevant Docket Entries	iii
Notice of Proposed Rulemaking, Issued November 25, 1970	1
Comments of Iowa-Illinois Gas and Electric Co	17
Comments of Southern California Edison Co	21
Comments of Pacific Gas and Electric Co	26
Comments of Public Service Electric and Gas Co	29
Comments of New England Power Co	32
Comments of Louisiana Power and Light Co	39
Comments of Edison Electric Institute	44
Comments of Columbia Gas System Service Corp	48
Comments of American Electric Power Service Corp	52
Comments of Consumers Power Co	64
Comments of Wisconsin Electric Power Co	68
Comments of Colorado Interstate Gas Co	71
Comments of Independent Natural Gas Association of America	76
Comments of Tennessee Gas Pipeline Co	85
Order No. 427, Issued March 18, 1971	87
Application of Edison Electric Institute for Rehearing	115
Application of Independent Natural Gas Association of America for Rehearing	120
Application of Southern California Edison Co. for Rehearing	126
Application of Tennessee Gas Pipeline Co. for Rehearing	132
Application of Montana Power Co. for Rehearing	137
Application of New England Power Co. for Rehearing	139
Order Denying Rehearing, Issued May 14, 1971	144
Order Granting Certiorari	153

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

Page

Statement 1

Reasons for granting the writ 12

Conclusion 24

Appendix A 26

Appendix B 28

Appendix C 30

Appendix D 32

Appendix E 34

Appendix F 36

Appendix G 38

Appendix H 40

Appendix I 42

Appendix J 44

Appendix K 46

Appendix L 48

Appendix M 50

Appendix N 52

Appendix O 54

Appendix P 56

Appendix Q 58

Appendix R 60

Appendix S 62

Appendix T 64

Appendix U 66

Appendix V 68

Appendix W 70

Appendix X 72

Appendix Y 74

Appendix Z 76

Appendix AA 78

Appendix BB 80

Appendix CC 82

Appendix DD 84

Appendix EE 86

Appendix FF 88

Appendix GG 90

Appendix HH 92

Appendix II 94

Appendix JJ 96

Appendix KK 98

Appendix LL 100

Appendix MM 102

Appendix NN 104

Appendix OO 106

Appendix PP 108

Appendix QQ 110

Appendix RR 112

Appendix SS 114

Appendix TT 116

Appendix UU 118

Appendix VV 120

Appendix WW 122

Appendix XX 124

Appendix YY 126

Appendix ZZ 128

Appendix AAA 130

Appendix BBB 132

Appendix CCC 134

Appendix DDD 136

Appendix EEE 138

Appendix FFF 140

Appendix GGG 142

Appendix HHH 144

Appendix III 146

Appendix JJJ 148

Appendix KKK 150

Appendix LLL 152

Appendix MMM 154

Appendix NNN 156

Appendix OOO 158

Appendix PPP 160

Appendix QQQ 162

Appendix RRR 164

Appendix SSS 166

Appendix TTT 168

Appendix UUU 170

Appendix VVV 172

Appendix WWW 174

Appendix XXX 176

Appendix YYY 178

Appendix ZZZ 180

Appendix AAAA 182

Appendix BBBB 184

Appendix CCCC 186

Appendix DDDD 188

Appendix EEEE 190

Appendix FFFF 192

Appendix GGGG 194

Appendix HHHH 196

Appendix IIII 198

Appendix JJJJ 200

Appendix KKKK 202

Appendix LLLL 204

Appendix MMMM 206

Appendix NNNN 208

Appendix OOOO 210

Appendix PPPP 212

Appendix QQQQ 214

Appendix RRRR 216

Appendix SSSS 218

Appendix TTTT 220

Appendix UUUU 222

Appendix VVVV 224

Appendix WWWW 226

Appendix XXXX 228

Appendix YYYY 230

Appendix ZZZZ 232

Appendix AAAAA 234

Appendix BBBBB 236

Appendix CCCCC 238

Appendix DDDDD 240

Appendix EEEEE 242

Appendix FFFFF 244

Appendix GGGGG 246

Appendix HHHHH 248

Appendix IIIII 250

Appendix JJJJJ 252

Appendix KKKKK 254

Appendix LLLLL 256

Appendix MMMMM 258

Appendix NNNNN 260

Appendix OOOOO 262

Appendix PPPPP 264

Appendix QQQQQ 266

Appendix RRRRR 268

Appendix SSSSS 270

Appendix TTTTT 272

Appendix UUUUU 274

Appendix VVVVV 276

Appendix WWWWW 278

Appendix XXXXX 280

Appendix YYYYY 282

Appendix ZZZZZ 284

Appendix AAAAAA 286

Appendix BBBBBB 288

Appendix CCCCCC 290

Appendix DDDDDD 292

Appendix EEEEEE 294

Appendix FFFFFF 296

Appendix GGGGGG 298

Appendix HHHHHH 300

Appendix IIIIII 302

Appendix JJJJJJ 304

Appendix KKKKKK 306

Appendix LLLLLL 308

Appendix MMMMMM 310

Appendix NNNNNN 312

Appendix OOOOOO 314

Appendix PPPPPP 316

Appendix QQQQQQ 318

Appendix RRRRRR 320

Appendix SSSSSS 322

Appendix TTTTTT 324

Appendix UUUUUU 326

Appendix VVVVVV 328

Appendix WWWWWW 330

Appendix XXXXXX 332

Appendix YYYYYY 334

Appendix ZZZZZZ 336

Appendix AAAAAAA 338

Appendix BBBBBBB 340

Appendix CCCCCCC 342

Appendix DDDDDDD 344

Appendix EEEEEEE 346

Appendix FFFFFFF 348

Appendix GGGGGGG 350

Appendix HHHHHHH 352

Appendix IIIIIII 354

Appendix JJJJJJJ 356

Appendix KKKKKKK 358

Appendix LLLLLLL 360

Appendix MMMMMMM 362

Appendix NNNNNNN 364

Appendix OOOOOOO 366

Appendix PPPPPPP 368

Appendix QQQQQQQ 370

Appendix RRRRRRR 372

Appendix SSSSSSS 374

Appendix TTTTTTT 376

Appendix UUUUUUU 378

Appendix VVVVVVV 380

Appendix WWWWWWW 382

Appendix XXXXXXX 384

Appendix YYYYYYY 386

Appendix ZZZZZZZ 388

Appendix AAAAAAAA 390

Appendix BBBBBBBB 392

Appendix CCCCCCCC 394

Appendix DDDDDDDD 396

Appendix EEEEEEEE 398

Appendix FFFFFFFF 400

Appendix GGGGGGGG 402

Appendix HHHHHHHH 404

Appendix IIIIIIII 406

Appendix JJJJJJJJ 408

Appendix KKKKKKKK 410

Appendix LLLLLLLL 412

Appendix MMMMMMMM 414

Appendix NNNNNNNN 416

Appendix OOOOOOOO 418

Appendix PPPPPPPP 420

Appendix QQQQQQQQ 422

Appendix RRRRRRRR 424

Appendix SSSSSSSS 426

Appendix TTTTTTTT 428

Appendix UUUUUUUU 430

Appendix VVVVVVVV 432

Appendix WWWWWWWW 434

Appendix XXXXXXXX 436

Appendix YYYYYYYY 438

Appendix ZZZZZZZZ 440

Appendix AAAAAAAAA 442

Appendix BBBBBBBBB 444

Appendix CCCCCCCCC 446

Appendix DDDDDDDDD 448

Appendix EEEEEEEEE 450

Appendix FFFFFFFFF 452

Appendix GGGGGGGGG 454

Appendix HHHHHHHHH 456

Appendix IIIIIIIII 458

Appendix JJJJJJJJJ 460

Appendix KKKKKKKKK 462

Appendix LLLLLLLLL 464

Appendix MMMMMMMMM 466

Appendix NNNNNNNNN 468

Appendix OOOOOOOOO 470

Appendix PPPPPPPPP 472

Appendix QQQQQQQQQ 474

Appendix RRRRRRRRR 476

Appendix SSSSSSSSS 478

Appendix TTTTTTTTT 480

Appendix UUUUUUUUU 482

Appendix VVVVVVVVV 484

Appendix WWWWWWWWW 486

Appendix XXXXXXXXX 488

Appendix YYYYYYYYY 490

Appendix ZZZZZZZZZ 492

Appendix AAAAAAAAAA 494

Appendix BBBBBBBBBB 496

Appendix CCCCCCCCCC 498

Appendix DDDDDDDDDD 500

Appendix EEEEEEEEEE 502

Appendix FFFFFFFFFF 504

Appendix GGGGGGGGGG 506

Appendix HHHHHHHHHH 508

Appendix IIIIIIIIII 510

Appendix JJJJJJJJJJ 512

Appendix KKKKKKKKKK 514

Appendix LLLLLLLLLL 516

Appendix MMMMMMMMMM 518

Appendix NNNNNNNNNN 520

Appendix OOOOOOOOOO 522

Appendix PPPPPPPPPP 524

Appendix QQQQQQQQQQ 526

Appendix RRRRRRRRRR 528

Appendix SSSSSSSSSS 530

Appendix TTTTTTTTTT 532

Appendix UUUUUUUUUU 534

Appendix VVVVVVVVVV 536

Appendix WWWWWWWWWW 538

Appendix XXXXXXXXXX 540

Appendix YYYYYYYYYY 542

Appendix ZZZZZZZZZZ 544

Appendix AAAAAAAAAAA 546

Appendix BBBBBBBBBBB 548

Appendix CCCCCCCCCCC 550

Appendix DDDDDDDDDDD 552

Appendix EEEEEEEEEEE 554

Appendix FFFFFFFFFFF 556

Appendix GGGGGGGGGGG 558

Appendix HHHHHHHHHHH 560

Appendix IIIIIIIIIII 562

Appendix JJJJJJJJJJJ 564

Appendix KKKKKKKKKKK 566

Appendix LLLLLLLLLLL 568

Appendix MMMMMMMMMMM 570

Appendix NNNNNNNNNNN 572

Appendix OOOOOOOOOOO 574

Appendix PPPPPPPPPPP 576

Appendix QQQQQQQQQQQ 578

Appendix RRRRRRRRRRR 580

Appendix SSSSSSSSSSS 582

Appendix TTTTTTTTTTT 584

Appendix UUUUUUUUUUU 586

Appendix VVVVVVVVVVV 588

Appendix WWWWWWWWWWW 590

Appendix XXXXXXXXXXX 592

Appendix YYYYYYYYYYY 594

Appendix ZZZZZZZZZZZ 596

Appendix AAAAAAAAAAAA 598

Appendix BBBBBBBBBBBB 600

Appendix CCCCCCCCCCCC 602

Appendix DDDDDDDDDDDD 604

Appendix EEEEEEEEEEEE 606

Appendix FFFFFFFFFFFF 608

Appendix GGGGGGGGGGGG 610

Appendix HHHHHHHHHHHH 612

Appendix IIIIIIIIIIII 614

Appendix JJJJJJJJJJJJ 616

Appendix KKKKKKKKKKKK 618

Appendix LLLLLLLLLLLL 620

Appendix MMMMMMMMMMMM 622

Appendix NNNNNNNNNNNN 624

Appendix OOOOOOOOOOOO 626

Appendix PPPPPPPPPPPP 628

Appendix QQQQQQQQQQQQ 630

Appendix RRRRRRRRRRRR 632

Appendix SSSSSSSSSSSS 634

Appendix TTTTTTTTTTTT 636

Appendix UUUUUUUUUUUU 638

Appendix VVVVVVVVVVVV 640

Appendix WWWWWWWWWWWW 642

Appendix XXXXXXXXXXXX 644

Appendix YYYYYYYYYYYY 646

Appendix ZZZZZZZZZZZZ 648

Appendix AAAAAAAAAAAAA 650

Appendix BBBBBBBBBBBBB 652

Appendix CCCCCCCCCCCCC 654

Appendix DDDDDDDDDDDDD 656

Appendix EEEEEEEEEEEEE 658

Appendix FFFFFFFFFFFFF 660

Appendix GGGGGGGGGGGGG 662

Appendix HHHHHHHHHHHHH 664

Appendix IIIIIIIIIIIII 666

Appendix JJJJJJJJJJJJJ 668

Appendix KKKKKKKKKKKKK 670

Appendix LLLLLLLLLLLLL 672

Appendix MMMMMMMMMMMMM 674

Appendix NNNNNNNNNNNNN 676

Appendix OOOOOOOOOOOOO 678

Appendix PPPPPPPPPPPPP 680

Appendix QQQQQQQQQQQQQ 682

Appendix RRRRRRRRRRRRR 684

Appendix SSSSSSSSSSSSS 686

Appendix TTTTTTTTTTTTT 688

Appendix UUUUUUUUUUUUU 690

Appendix VVVVVVVVVVVVV 692

Appendix WWWWWWWWWWWWW 694

Appendix XXXXXXXXXXXXX 696

Appendix YYYYYYYYYYYYY 698

Appendix ZZZZZZZZZZZZZ 700

Appendix AAAAAAAAAAAAAA 702

Appendix BBBBBBBBBBBBBB 704

Appendix CCCCCCCCCCCCCC 706

Appendix DDDDDDDDDDDDDD 708

Appendix EEEEEEEEEEEEEE 710

Appendix FFFFFFFFFFFFFF 712

Appendix GGGGGGGGGGGGGG 714

Appendix HHHHHHHHHHHHHH 716

Appendix IIIIIIIIIIIIII 718

Appendix JJJJJJJJJJJJJJ 720

Appendix KKKKKKKKKKKKKK 722

Appendix LLLLLLLLLLLLLL 724

Appendix MMMMMMMMMMMMMM 726

Appendix NNNNNNNNNNNNNN 728

Appendix OOOOOOOOOOOOOO 730

Appendix PPPPPPPPPPPPPP 732

Appendix QQQQQQQQQQQQQQ 734

Appendix RRRRRRRRRRRRRR 736

Appendix SSSSSSSSSSSSSS 738

Appendix TTTTTTTTTTTTTT 740

Appendix UUUUUUUUUUUUUU 742

Appendix VVVVVVVVVVVVVV 744

Appendix WWWWWWWWWWWWWW 746

Appendix XXXXXXXXXXXXXX 748

Appendix YYYYYYYYYYYYYY 750

Appendix ZZZZZZZZZZZZZZ 752

Appendix AAAAAAAAAAAAAAA 754

Appendix BBBBBBBBBBBBBBB 756

Appendix CCCCCCCCCCCCCCC 758

Appendix DDDDDDDDDDDDDDD 760

Appendix EEEEEEEEEEEEEEE 762

Appendix FFFFFFFFFFFFFFF 764

Appendix GGGGGGGGGGGGGGG 766

Appendix HHHHHHHHHHHHHHH 768

Appendix IIIIIIIIIIIIIII 770

Appendix JJJJJJJJJJJJJJJ 772

Appendix KKKKKKKKKKKKKKK 774

Appendix LLLLLLLLLLLLLLL 776

Appendix MMMMMMMMMMMMMMM 778

Appendix NNNNNNNNNNNNNNN 780

Appendix OOOOOOOOOOOOOOO 782

Appendix PPPPPPPPPPPPPPP 784

Appendix QQQQQQQQQQQQQQQ 786

Appendix RRRRRRRRRRRRRRR 788

Appendix SSSSSSSSSSSSSSS 790

Appendix TTTTTTTTTTTTTTT 792

Appendix UUUUUUUUUUUUUUU 794

Appendix VVVVVVVVVVVVVVV 796

Appendix WWWWWWWWWWWWWWW 798

Appendix XXXXXXXXXXXXXXX 800

Appendix YYYYYYYYYYYYYYY 802

Appendix ZZZZZZZZZZZZZZZ 804

Appendix AAAAAAAAAAAAAAAA 806

Appendix BBBBBBBBBBBBBBBB 808

Appendix CCCCCCCCCCCCCCCC 810

Appendix DDDDDDDDDDDDDDDD 812

Appendix EEEEEEEEEEEEEEEE 814

Appendix FFFFFFFFFFFFFFFF 816

Appendix GGGGGGGGGGGGGGGG 818

Appendix HHHHHHHHHHHHHHHH 820

Appendix IIIIIIIIIIIIIIII 822

Appendix JJJJJJJJJJJJJJJJ 824

Appendix KKKKKKKKKKKKKKKK 826

Appendix LLLLLLLLLLLLLLLL 828

Appendix MMMMMMMMMMMMMMMM 830

Appendix NNNNNNNNNNNNNNNN 832

Appendix OOOOOOOOOOOOOOOO 834

Appendix PPPPPPPPPPPPPPPP 836

Appendix QQQQQQQQQQQQQQQQ 838

Appendix RRRRRRRRRRRRRRRR 840

Appendix SSSSSSSSSSSSSSSS 842

Appendix TTTTTTTTTTTTTTTT 844

Appendix UUUUUUUUUUUUUUUU 846

Appendix VVVVVVVVVVVVVVVV 848

Appendix WWWWWWWWWWWWWWWW 850

Appendix XXXXXXXXXXXXXXXX 852

Appendix YYYYYYYYYYYYYYYY 854

Appendix ZZZZZZZZZZZZZZZZ 856

Appendix AAAAAAAAAAAAAAAAA 858

Appendix BBBBBBBBBBBBBBBBB 860

Appendix CCCCCCCCCCCCCCCCC 862

Appendix DDDDDDDDDDDDDDDDD 864

Appendix EEEEEEEEEEEEEEEEE 866

Appendix FFFFFFFFFFFFFFFFF 868

Appendix GGGGGGGGGGGGGGGGG 870

Appendix HHHHHHHHHHHHHHHHH 872

Appendix IIIIIIIIIIIIIIIII 874

Appendix JJJJJJJJJJJJJJJJJ 876

Appendix KKKKKKKKKKKKKKKKK 878

Appendix LLLLLLLLLLLLLLLLL 880

Appendix MMMMMMMMMMMMMMMMM 882

Appendix NNNNNNNNNNNNNNNNN 884

Appendix OOOOOOOOOOOOOOOOO 886

Appendix PPPPPPPPPPPPPPPPP 888

Appendix QQQQQQQQQQQQQQQQQ 890

Appendix RRRRRRRRRRRRRRRRR 892

Appendix SSSSSSSSSSSSSSSSS 894

Appendix TTTTTTTTTTTTTTTTT 896

Appendix UUUUUUUUUUUUUUUUU 898

Appendix VVVVVVVVVVVVVVVVV 900

Appendix WWWWWWWWWWWWWWWWW 902

Appendix XXXXXXXXXXXXXXXXX 904

Appendix YYYYYYYYYYYYYYYYY 906

Appendix ZZZZZZZZZZZZZZZZZ 908

Appendix AAAAAAAAAAAAAAAAAA 910

Appendix BBBBBBBBBBBBBBBBBB 912

Appendix CCCCCCCCCCCCCCCCCC 914

Appendix DDDDDDDDDDDDDDDDDD 916

Appendix EEEEEEEEEEEEEEEEEE 918

Appendix FFFFFFFFFFFFFFFFFF 920

Appendix GGGGGGGGGGGGGGGGGG 922

Appendix HHHHHHHHHHHHHHHHHH 924

Appendix IIIIIIIIIIIIIIIIII 926

Appendix JJJJJJJJJJJJJJJJJJ 928

Appendix KKKKKKKKKKKKKKKKKK 930

Appendix LLLLLLLLLLLLLLLLLL 932

Appendix MMMMMMMMMMMMMMMMMM 934

Appendix NNNNNNNNNNNNNNNNNN 936

Appendix OOOOOOOOOOOOOOOOOO 938

Appendix PPPPPPPPPPPPPPPPPP 940

Appendix QQQQQQQQQQQQQQQQQQ 942

Appendix RRRRRRRRRRRRRRRRRR 944

Appendix SSSSSSSSSSSSSSSSSS 946

Appendix TTTTTTTTTTTTTTTTTT 948

Appendix UUUUUUUUUUUUUUUUUU 950

Appendix VVVVVVVVVVVVVVVVVV 952

Appendix WWWWWWWWWWWWWWWWWW 954

Appendix XXXXXXXXXXXXXXXXXX 956

Appendix YYYYYYYYYYYYYYYYYY 958

Appendix ZZZZZZZZZZZZZZZZZZ 960

Appendix AAAAAAAAAAAAAAAAAAA 962

Appendix BBBBBBBBBBBBBBBBBBB 964

Appendix CCCCCCCCCCCCCCCCCCC 966

Appendix DDDDDDDDDDDDDDDDDDD 968

Appendix EEEEEEEEEEEEEEEEEEE 970

Appendix FFFFFFFFFFFFFFFFFFF 972

Appendix GGGGGGGGGGGGGGGGGGG 974

Appendix HHHHHHHHHHHHHHHHHHH 976

Appendix IIIIIIIIIIIIIIIIIII 978

Appendix JJJJJJJJJJJJJJJJJJJ 980

Appendix KKKKKKKKKKKKKKKKKKK 982

Appendix LLLLLLLLLLLLLLLLLLL 984

Appendix MMMMMMMMMMMMMMMMMMM 986

Appendix NNNNNNNNNNNNNNNNNNN 988

Appendix OOOOOOOOOOOOOOOOOOO 990

Appendix PPPPPPPPPPPPPPPPPPP 992

Appendix QQQQQQQQQQQQQQQQQQQ 994

Appendix RRRRRRRRRRRRRRRRRRR 996

Appendix SSSSSSSSSSSSSSSSSSS 998

Appendix TTTTTTTTTTTTTTTTTTT 1000

Appendix UUUUUUUUUUUUUUUUUUU 1002

Appendix VVVVVVVVVVVVVVVVVVV 1004

Appendix WWWWWWWWWWWWWWWWWWW 1006

Appendix XXXXXXXXXXXXXXXXXXX 1008

Appendix YYYYYYYYYYYYYYYYYYY 1010

Appendix ZZZZZZZZZZZZZZZZZZZ 1012

Appendix AAAAAAAAAAAAAAAAAAAA 1014

Appendix BBBBBBBBBBBBBBBBBBBB 1016

Appendix CCCCCCCCCCCCCCCCCCCC 1018

Appendix DDDDDDDDDDDDDDDDDDDD 1020

Appendix EEEEEEEEEEEEEEEEEEEE 1022

Appendix FFFFFFFFFFFFFFFFFFFF 1024

Appendix GGGGGGGGGGGGGGGGGGGG 1026

Appendix HHHHHHHHHHHHHHHHHHHH 1028

Appendix IIIIIIIIIIIIIIIIIIII 1030

Appendix JJJJJJJJJJJJJJJJJJJJ 1032

Appendix KKKKKKKKKKKKKKKKKKKK 1034

Appendix LLLLLLLLLLLLLLLLLLLL 1036

Appendix MMMMMMMMMMMMMMMMMMMM 1038

Appendix NNNNNNNNNNNNNNNNNNNN 1040

Appendix OOOOOOOOOOOOOOOOOOOO 1042

Appendix PPPPPPPPPPPPPPPPPPPP 1044

Appendix QQQQQQQQQQQQQQQQQQQQ 1046

Appendix RRRRRRRRRRRRRRRRRRRR 1048

Appendix SSSSSSSSSSSSSSSSSSSS 1050

Appendix TTTTTTTTTTTTTTTTTTTT 1052

Appendix UUUUUUUUUUUUUUUUUUUU 1054

Appendix VVVVVVVVVVVVVVVVVVVV 1056

Appendix WWWWWWWWWWWWWWWWWWWW 1058

Appendix XXXXXXXXXXXXXXXXXXXX 1060

Appendix YYYYYYYYYYYYYYYYYYYY 1062

Appendix ZZZZZZZZZZZZZZZZZZZZ 1064

Appendix AAAAAAAAAAAAAAAAAAAAA 1066

Appendix BBBBBBBBBBBBBBBBBBBBB 1068

Appendix CCCCCCCCCCCCCCCCCCCCC 1070

Appendix DDDDDDDDDDDDDDDDDDDDD 1072

Appendix EEEEEEEEEEEEEEEEEEEEE 1074

Appendix FFFFFFFFFFFFFFFFFFFFF 1076

Appendix GGGGGGGGGGGGGGGGGGGGG 1078

Appendix HHHHHHHHHHHHHHHHHHHHH 1080

Appendix IIIIIIIIIIIIIIIIIIIII 1082

Appendix JJJJJJJJJJJJJJJJJJJJJ 1084

Appendix KKKKKKKKKKKKKKKKKKKKK 1086

Appendix LLLLLLLLLLLLLLLLLLLLL 1088

Appendix MMMMMMMMMMMMMMMMMMMMM 1090

Appendix NNNNNNNNNNNNNNNNNNNNN 1092

Appendix OOOOOOOOOOOOOOOOOOOOO 1094

Appendix PPPPPPPPPPPPPPPPPPPPP 1096

Appendix QQQQQQQQQQQQQQQQQQQQQ 1098

Appendix RRRRRRRRRRRRRRRRRRRRR 1100

Appendix SSSSSSSSSSSSSSSSSSSSS 1102

Appendix TTTTTTTTTTTTTTTTTTTTT 1104

Appendix UUUUUUUUUUUUUUUUUUUUU 1106

Appendix VVVVVVVVVVVVVVVVVVVVV 1108

Appendix WWWWWWWWWWWWWWWWWWWWW 1110

Appendix XXXXXXXXXXXXXXXXXXXXX 1112

Appendix YYYYYYYYYYYYYYYYYYYYY 1114

Appendix ZZZZZZZZZZZZZZZZZZZZZ 1116

Appendix AAAAAAAAAAAAAAAAAAAAAA 1118

Appendix BBBBBBBBBBBBBBBBBBBBBB 1120

Appendix CCCCCCCCCCCCCCCCCCCCCC 1122

Appendix DDDDDDDDDDDDDDDDDDDDDD 1124

Appendix EEEEEEEEEEEEEEEEEEEEEE 1126

Appendix FFFFFFFFFFFFFFFFFFFFFF 1128

Appendix GGGGGGGGGGGGGGGGGGGGGG 1130

Appendix HHHHHHHHHHHHHHHHHHHHHH 1132

Appendix IIIIIIIIIIIIIIIIIIIIII 1134

Appendix JJJJJJJJJJJJJJJJJJJJJJ 1136

Appendix KKKKKKKKKKKKKKKKKKKKKK 1138

Appendix LLLLLLLLLLLLLLLLLLLLLL 1140

Appendix MMMMMMMMMMMMMMMMMMMMMM 1142

Appendix NNNNNNNNNNNNNNNNNNNNNN 1144

Appendix OOOOOOOOOOOOOOOOOOOOOO 1146

Appendix PPPPPPPPPPPPPPPPPPPPPP 1148

Appendix QQQQQQQQQQQQQQQQQQQQQQ 1150

Appendix RRRRRRRRRRRRRRRRRRRRRR 1152

Appendix SSSSSSSSSSSSSSSSSSSSSS 1154

Appendix TTTTTTTTTTTTTTTTTTTTTT 1156

Appendix UUUUUUUUUUUUUUUUUUUUUU 1158

Appendix VVVVVVVVVVVVVVVVVVVVVV 1160

Appendix WWWWWWWWWWWWWWWWWWWWWW 1162

Appendix XXXXXXXXXXXXXXXXXXXXXX 1164

Appendix YYYYYYYYYYYYYYYYYYYYYY 1166

Appendix ZZZZZZZZZZZZZZZZZZZZZZ 1168

Appendix AAAAAAAAAAAAAAAAAAAAAAA 1170

Appendix BBBBBBBBBBBBBBBBBBBBBBB 1172

Appendix CCCCCCCCCCCCCCCCCCCCCCC 1174

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Relevant Docket Entries

THE COMMISSION PROCEEDINGS

1970:	
November 25.....	Notice of Proposed Rulemaking issued in FPC Docket No. R-408.
1971:	
March 18.....	FPC Order No. 425 issued in Docket No. R-408.
May 14.....	Order Denying Rehearing issued in FPC Docket No. R-408.

THE COURT OF APPEALS PROCEEDINGS

1971:	
June 9.....	Petition for review filed by New England Power Company.
July 7.....	Petition for review filed by Independent Natural Gas Association of America.
July 13.....	Petition for review filed by Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.
1972:	
August 15.....	Opinion and Judgment of Court of Appeals setting aside Order No. 427 as it relates to annual fees.
September 12.....	Petition of FPC for rehearing.
September 25.....	Order of Court of Appeals denying petition for rehearing.

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[1]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[18 CFR, Parts 3, 32, 33,
34, 35, 36, 45, and 159]

Revision of Existing and	)	
Establishment of New Schedules	)	
of Fees to be Paid by Electric	)	
Public Utility Companies and	)	Docket No. R-408
Natural Gas Companies and for	)	
Miscellaneous Services Rendered	)	
by the Federal Power Commission	)	

NOTICE OF PROPOSED RULEMAKING
(November 25, 1970)

Notice is hereby given, pursuant to Section 553 of Title 5 of the United States Code that the Commission is proposing to amend its general rules and regulations under the Federal Power Act and the Natural Gas Act to revise the schedules of fees at present imposed in connection with the filing of certain applications by natural gas companies under the Natural Gas Act and to establish new schedules of fees and annual charges to be applicable to electric utility companies and natural gas producers and pipelines.

Any interested person may submit to the Federal Power Commission, Washington, D.C., 20426, not later than December 18, 1970, data, views, comments, and suggestions, in writing, concerning all or part of the amendments proposed herein. An original and 14 conformed copies should be filed with the Secretary of the Commission. Submittals to the Commission should indicate the name, title, and mailing address of the person to whom communications concerning the proposal should be addressed, and whether the person filing them requests a conference at the Federal Power Commission to discuss the proposed amendments. The Commission will consider all such written submittals before acting on the matters herein proposed.

(2)

[2]

Annual charges have long been assessed against licensees of hydroelectric projects pursuant to Congressional direction contained in Part I of the Federal Power Act to require payment *inter alia* by them "in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part;" and "for recompensing it for the use, occupancy, and enjoyment of its lands or other property. . .".[1]

Additionally, Congress has by statute vested authority in all agencies of the federal government to prescribe fees or charges for services conferring benefits on persons subject to their jurisdiction so as to render such agencies as fully self-sustaining as possible. The pertinent provision which is included in Title V of the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 USC 483a), reads as follows:

> It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including

[3]

> groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency

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[1] In addition, licensees and holders of permits affected by a determination by the Commission of headwater benefits are required to pay to the United States the cost of making such determination. Provisions for such payments appearing in Section 10(e) and (f) were contained in the original Federal Water Power Act, 41 Stat. 1063, approved June 10, 1920. Implementing regulations appear in Part II of the Commission's Regulations Under the Federal Power Act, 18 CFR 11.20 *et seq.*

is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further*, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

Pursuant to such statute and to recommendations made at hearings before Congressional appropriation committees, we established by order our first schedule of fees (apart from those under Part I of the Federal Power Act) which were payable in connection with applications filed by natural gas pipeline companies for certificates of public convenience and necessity and for other authorizations as especially beneficial to the recipients of the services rendered in their processing. Order 317, F.R. 430, January 13, 1966, as amended by FPC Order 317-A, 31 F.R. 4890, March 24, 1966, Part 159 of the Commission's Regulations Under the Natural Gas Act, 18 CFR, Part 159.

Congressional appropriation committees have since requested further review of our fee schedules with a view to making increases or adjustments to offset in part the increasing needs for direct appropriations for agency operating expenses. S. Rept. No. 1375, 90th Cong., 2d Sess.; H. Rept. No. 1348, 90th Cong., 2d Sess. More recently, the Chairman of the Subcommittee on Independent Offices and Department of Housing and Urban Development of the Committee on Appropriations of the House of Representatives requested us to review our rate and fee structures with a view to charging gas and utility companies enough to sustain our administrative operations. Hearings, Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., Part 2, p. 951.

In compliance with the spirit of the 1952 Appropriation Act, Executive directives[2] and subsequent Committee recommendations, we have thoroughly reviewed the existing fee structure and the areas of our administrative operations which have not heretofore been subject to any charges. The fee schedules we propose to adopt have been prepared in the light thereof to meet the statutory objective of making the Commission "self-sustaining to the full extent possible", to recoup by way of payment into the Treasury of the United States the sums reasonably allocable to the estimated costs in FY 1971 of rendering the types of services performed by the Commission as reflected by costs experienced in FY 1970, and to allocate fees and charges as fairly and as equitably as practicable "taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts...".

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[2]Circular No. A-25, issued September 23, 1959 by the Bureau of the Budget (now Office of Management and Budget), as subsequently amended, sets forth for agency action the scope of user charges activities, guidelines for carrying out the policies prescribed therein and required submission of periodic status reports.

[5]

We propose no changes in the fee schedule relating to Part I of the Federal Power Act since the charges thereby generated substantially cover the cost of administering that part of the Act.[3]

Our order adopting fee schedules applicable to natural gas pipelines recognized that "neither our costs nor the dollar value of facilities will remain static" and that revision "may be necessary in the light of subsequent experience." The growing complexity of certificate proceedings and increases in costs incurred in administering the certificate programs requires a slight upward readjustment of the rates presently applicable if our operation of this activity is to remain self-sustaining. Accordingly, we propose to increase the amounts payable in connection with applications for certificates under Section 7 (c) and (e) of the Natural Gas Act.

The remaining costs of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings. Our proposal to allocate estimated costs among jurisdictional companies on the basis of their relative amounts of natural gas delivered seems fair and equitable since their rates are subject to continued surveillance in addition to the complexity of the issues raised in the augmented number of applications for rate increases which have surfaced in recent years.

[6]

We also propose to adopt a fee schedule which will return to the Treasury the costs of the producer certificate program based upon the annual commitments of new reserves to the pipelines for interstate deliveries. For reasons of administrative convenience these charges would be paid by the pipelines on the basis of new reserves reported as certificated during each reporting period. The pipelines will be able to recoup the amount of such payments

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[3] FY 1970 collections for administering Part I of the Federal Power Act totalled $2,568,106 in contrast with actual costs of operations for that Part of $2,966,977 (exclusive of overhead expense and services to other agencies and the public). However, collections effected under Part I powers vested in the Commission totalled $5,337,703, of which $4,504,299 was paid into the Treasury.

from their customers as part of the costs upon which their rates and charges are based.

The proposed assessments and fees applicable to our functions under Parts II and III of the Federal Power Act are new. Our functions in carrying out the responsibilities imposed under those parts of the Federal Power Act confer benefits upon the recipients. The manner in which allocations should be made has been the subject of much study. We believe our proposals not only spread those costs fairly and equitably but that they are consistent with the legislative and executive mandates we are required to carry out.

The filing fees to be paid upon the filing of designated applications and rate schedules, other than for major rate increases, are in fixed amounts based upon average historic costs incurred in the administration of each of those functions. The sliding scale proposed for major rate increases based upon gross revenues represents, in our judgment, a fair and equitable method of providing for recovery of the average costs involved in the consideration and disposition of those items.

We have also proposed a formula to recoup the remaining costs of our regulatory program and those incurred in the administration of reliability functions by assessments based on revenues as reasonably representative of the value of those services to such companies. We believe our activities in both areas of our operations provide special benefits to the companies subject to our jurisdiction that fully justify the scale of charges we propose to initiate.

[7]

Additional miscellaneous charges have been considered to cover costs incurred in connection with the location of file materials requested for inspection and/or copying. Under existing regulations fees are charged for copying pursuant to contract with a private company which provides that service. Moreover, about 75 percent of our searches for filed materials requires less than one-half hour for which charges would not be administratively feasible. In these circumstances, we believe that only a fee should be charged for certification of documents in the amount of $2.00 to cover the estimated cost thereof.

In developing these schedules we have endeavored to adhere to the guidelines contained in Budget Circular No. A-25 by the imposition of charges "to each identifiable recipient for a measurable unit or amount of Government service . . . from which he derives a special benefit." These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . ." or provides "more immediate or substantial gains or values . . . than those which accrue to the general public . . ." or provides business stability or assures public confidence in the business activity of the beneficiary. . ." or is "performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public...".

Costs directly allocable to a specific type of service rendered to specifically identifiable persons would be effected by charges directly related to that specific service. In determining the amount thereof we are not required to keep cost records on a case-by-case basis but are authorized to average the costs involved in a particular service. *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304 (CA7, 1964), certiorari denied, 379 U.S. 966 (1965). Our remaining proposed charges being of benefit overall to the members of both industries would be assessed on a measure of size against those within the ambit of our jurisdictional activities.

[8]

The proposed amendments to the Commission's regulations would be issued under the authority granted by the Federal Power Act, particularly Section 309 (49 Stat. 858, 16 USC 825h) and the Natural Gas Act, particularly Section 16 (52 Stat. 830, 15 USC 717o).

A. The following are proposed amendments to Part 3, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations.

(8)

1. Amend the title of Part 3 by inserting the words "Miscellaneous Charges" immediately preceding the words "Ethical Standards". As so amended the title of Part 3 will read:

PART 3—ORGANIZATION; OPERATION; INFORMATION AND REQUESTS; MISCELLANEOUS CHARGES; ETHICAL STANDARDS.

2. Amend "§ 3.102 Public information, requests, and assistance" by revising the section title and by revising paragraph (b) to read as follows:

§ 3.102 Public information, requests, and assistance; miscellaneous charges.

* * * * * *

(b) During the Commission's regular business hours, the public may examine in the Office of Public Information in Washington, D.C., copies of public information filed with the Commission. Photo copies of public material may be obtained through the public reference room. Fees charged for such copies are established by an annual contract between the Commission and a private company which does the work. Current schedules of fees for copying work are available from the Office of Public Information. Except for requests made by government agencies certification of copies of any official Commission record shall be accompanied by a fee of two dollars. Inquiries and orders may be made to that office personally, by telephone, or by mail.

[9]

B. The following are proposed amendments to Subchapter B—Regulations under the Federal Power Act, Chapter I, Title 18 of the Code of Federal Regulations:

1. Revise the title of "Part 11—Annual Charges" to read as follows:

PART 11–ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

2. In "Part 32–Interconnection of Facilities; Emergencies; Transmission to Foreign Country.", revise the section titles and introductory clauses of §§ 32.1, 32.22, 32.51, to read as follows:

§ 32.1 Contents of application; filing fee.

Every application under section 202 (b) of the Act shall be accompanied by the fee described in Part 36 of this Subchapter and shall set forth the following information:

* * * * *

§ 32.22 Application for permanent connection for emergency use; contents; form and style; filing fee; number of copies.

Application for Commission approval of a permanent connection for emergency use only shall be accompanied by the fee described in Part 36 of this Subchapter and shall conform with the requirements of §§ 32.1 to 32.4, inclusive, and, in addition, shall state in full the reasons why such permanent connection for emergency use is necessary in the public interest.

§ 32.51 Contents of application; filing fee.

Every application shall be accompanied by the fee described in Part 36 of this Subchapter and shall set forth in the order indicated, the following:

* * * * *

[10]

3. In "Part 33–Application for Sale, Lease, or Other Disposition, Merger or Consolidation of Facilities, or for Purchase or Acquisition of Securities of a Public Utility", revise the title and introductory sentence of § 33.2 to read as follows:

§ 33.2 Contents of application; filing fee.

Each such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee described in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information, which should, insofar as possible, be furnished as to said applicant and each company whose facilities or securities are involved:

* * * * *

4. In "Part 34—Application for Authorization of the Issuance of Securities or the Assumption of Liabilities", revise the title and introductory sentence of § 34.2 to read as follows:

§ 34.2 Contents of application; filing fee.

Every such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee described in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which, in the case of the assumption of a liability, shall be furnished as to both the issuer and the person assuming liability:

* * * * *

5. In "Part 35—Filing of Rate Schedules", between the heading "Application" and "§ 35.1 Application; obligation to file rate schedules", insert a new "§ 35.0 Filing fees", which will read as follows:

§ 35.0 Filing fees.

Every filing made under this part shall be accompanied by the fee described in Part 36 of this Subchapter.

[11]

6. Immediately following Part 35, add a new "Part 36–Annual Charges and Fees" which will read as follows:

PART 36–ANNUAL CHARGES AND FEES UNDER PARTS II AND III OF THE FEDERAL POWER ACT

§ 36.1 Annual charges.

Reasonable annual charges shall be assessed by the Commission against each public utility to reimburse the United States for such costs of administration of Parts II and III of the Federal Power Act as hereinafter provided:

(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's public utility regulatory and interconnection and coordination programs from which shall be deducted the amounts reserved pursuant to the provisions of paragraph (c) of this section and section 36.2 of this part.

(b) For each calendar year terminating in such fiscal period the costs of administration determined under paragraph (a) of this section shall be assessed against each public utility in the proportion that the gross revenues of such public utility bear to the sum of the gross revenues of all public utilities for the like period.

(c) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

[12]

§ 36.2 Filing fees.

A filing fee in the amounts set forth below shall accompany each of the following:

(a) Applications for physical connections $150

(b) Applications for the construction of border facilities $150

(c) Other corporate applications authorized by these regulations under the Federal Power Act, except applications under Part I of the Federal Power Act, applications for authority to hold interlocking positions, and applications for the merger or consolidation of public utilities as provided in paragraph (d) of this section..... $500

(d) Applications for the merger or consolidation of Class A or Class B public utilities or any combination thereof.. $10,000

(e) Nominal rate schedule filings other than that involving rate increases $100

(1) Examples of such filings include schedule changes having minimal impact on the operations of a public utility such as those providing service to an additional delivery point, changes in maximum obligation to serve, changes in minimum billing demand not affecting billings, changes in service rules or regulations not affecting billings, extensions of terms of contracts or continuation of service, cancellation of rate schedules

where service is no longer needed, changes in delivery voltages or metering voltages, changes in contract provisions not affecting service, rates or

billings, and adoption of initial rate schedules containing rates identical to rates applicable to the same customer class previously accepted for filing.

(f) Moderately complex rate schedule filings..... $500

(1) Examples of such filings include schedule changes presenting more complex administrative problems such as those involving interconnection agreements, pooling agreements and additional large-scale sales.

(g) Rate schedule filings involving nominal rate increases..... $500

(1) These include schedule changes involving increases in rates totalling less than $50,000.

(h) Rate schedule filings involving rate increases other than covered under paragraph (g) of this section, as follows:

1 percent of the amount of such increases up to but not exceeding $1 million;

$10,000 plus 1/2 percent of the amount of such increases in excess of $1 million and not exceeding $10 million;

$55,000 plus 1/4 percent of the amount of such increases in excess of $10 million.

[14]

(i) Applications to hold interlocking positions..... $100

§ 36.3 Miscellaneous

Annual assessments and fee payments shall be made by check or money order to the Treasurer of the United States. No fees will be refunded.

§ 36.4 Accounting for fees paid pursuant to this part.

A public utility subject to the provisions of this part shall account for the assessments and fees paid by charging the amounts thereof to Account 928, Regulatory commission expenses.

7. In "Part 45—Application for Authority to Hold Interlocking Positions", revise the title and introductory clause of § 45.8 to read as follows:

§ 45.8 Contents of application; filing fee.

Each application shall be accompanied by the fee described in Part 36 of this Subchapter and shall state the following:

* * * * *

B. The following are proposed amendments to Part 159, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18 of the Code of Federal Regulations:

1. In § 159.2 Applications involving construction or acquisition of facilities, revise paragraphs (a), (b) and (d) to read as follows:

§ 159.2 Applications involving construction or acquisition of facilities.

* * * * *

[15]

(a) Within 30 days following issuance of notice of application, an amount equal to 65/1000 of 1 percent (0.00065) of the estimated cost of construction of new facilities or of facilities to be acquired;

(b) Within 30 days following grant of the certificate, an amount equal to 130/1000 of 1 percent (0.00130) of the estimated cost of construction of new facilities or of facilities to be acquired, unless applicant does not accept the certificate.

* * * * *

(d) If the actual cost of construction of new facilities or of facilities to be acquired exceeds the estimated cost thereof, the statement of actual cost, required to be submitted by § 157.20(c)(4) and (d)(3) of this chapter, shall be accompanied by an amount equal to 195/1000 of 1 percent (0.00195) of the excess of actual cost (plus estimated cost of facilities for which actual cost is not then recorded on the books of applicant) above estimated cost.

* * * * *

2. Immediately following § 159.2, insert a new "§ 159.2a Costs administration" which will read as follows:

§ 159.2a Costs of administration.

Reasonable annual charges will be assessed by the Commission against natural gas companies to reimburse the United States for costs of administration of the Natural Gas Act, as follows:

(a) A determination shall be made for each fiscal year of the costs of administration of the natural gas pipeline programs from which shall be deducted the amounts received pursuant to the provisions of sections 159.1 and 159.2 of this Part.

[16]

(b) For each calendar year terminating in such fiscal period the costs of administration determined under paragraph (a) of this section shall be assessed against

each Class A and Class B natural gas company in the proportion that the total gas deliveries of such natural gas company bear to the sum of the total gas deliveries of all Class A and Class B natural gas companies for the like period.

(c) In addition to the annual charges prescribed by paragraphs (a) and (b) of this section, each natural gas company required to file an Annual Report - Total Gas Supply on FPC Form No. 15 shall be assessed one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form.

(d) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

3. In "§ 159.3 Miscellaneous", revise paragraph (a) to read as follows:

§ 159.3 Miscellaneous.

(a) *Method of Payment.* Annual assessments and fee payments shall be made by check or money order payable to the Treasurer of the United States. No fees will be refunded.

The Secretary shall cause prompt publication of this notice to be made in the Federal Register.

By direction of the Commission.

Gordon M. Grant,
Secretary.

[34]

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY
DAVENPORT, IOWA

WILLIAM B. WATERMAN
Vice President and General Counsel

December 15, 1970

Gordon M. Grant, Secretary
Federal Power Commission
441 G Street N.W.
Washington, D.C. 20426

Dear Mr. Grant:

Revision of existing	)	
and establishment of	)	Docket R-408
new schedule of fees	)	

Iowa-Illinois Gas and Electric Company herewith submits its comments and suggestions relative to Notice of Proposed Rulemaking issued November 25, 1970, in the above docket. The Company is classified by the Commission as a natural gas company under the Natural Gas Act and a public utility under the Federal Power Act. The name, title and mailing address of the person to whom communications concerning this proposal should be addressed is:

W. B. Waterman, Vice President and
General Counsel
Iowa-Illinois Gas and Electric Company
206 East Second Street
P.O. Box 4350
Davenport, Iowa.

The Company does not request a conference at the Commission to discuss the proposed amendments.

1. With reference to the effective date of this rulemaking as related to fee schedules proposed under Sections 36.2 and 159.2, Iowa-Illinois suggests consideration be given to the prospective

application of fee charges on applications submitted or rate schedules filed after a certain future date. As written, doubt exists whether the

[35]

fee schedules apply to certificate applications already on file but where periodic fees are as yet unpaid or not yet determinable, and, to electric rate schedules filed but not yet made effective.

2. The charges under Section 36.2 appear rather sizable, although Iowa-Illinois has no information upon which to judge the appropriateness of the level of charges proposed or of the sudden disparity between $100 and $500 fees. We suggest further review be made of this fee schedule. There may occur differences of opinion on categorization between "nominal" filings and "moderately complex" filings which may have to be resolved on an *ad hoc* basis. Nominal rate increases for indeterminate purchases or exchanges of energy, for example, may merit far less than a $500 fee even though they may not qualify as an initial rate schedule at $100. Parties may desire to simplify format of an interchange agreement without substantial changes and at the same time raise one element of a charge, which may merit far less than a $500 fee. Further, there is uncertainty whether the filing utility pays the entire fee, or whether the fee specified is to be split among the concurring parties.

3. Applicability of Section 159.2a to a company such as Iowa-Illinois is questioned. The Company urges consideration be given to a provision exempting from proposed Section 159.2a those Class A and Class B natural gas companies making no sales for resale and, therefore, having no rates on file with the Commission, on the following grounds:

a. The Company is engaged in the business of distributing and selling at retail natural gas in various communities in Iowa and Illinois. It makes no sale of natural gas for resale, nor is it engaged in the transportation of gas for purposes other than supplying its own distribution system. The Company has two wholesale

pipeline suppliers upon which its operating districts are solely, and separately, dependent for their supplies of natural gas. No gas is purchased from producers, no producer reserves are committed to the Company, and the Company has no gas rates on file with the Commission.

[36]

(b) Iowa-Illinois, having no committed reserves or producer supply, and being solely dependent upon pipeline purchases near its distribution areas, is not required to file the gas supply Form 15. By reading Section 260.7(b)(2), Part 160 - Statements and Reports, now in effect, we see that proposed Section 159.2a(c) is inapplicable to those not required to file Form 15. By the same reasoning, proposed Section 159.2a in its entirety, and its underlying rationale, appears inapplicable to Iowa-Illinois. At page 5 (last paragraph) and page 6 (first paragraph) of the Notice, the Commission's costs sought to be recovered are principally those of passing upon rate filings and producer certificates. Since Iowa-Illinois makes no sales of gas for resale, and therefore does not have rates on file with the Commission, it ought not be assessed.

(c) Direct assessments against wholesale pipeline suppliers of Iowa-Illinois will be paid by Iowa-Illinois as such suppliers' operating expenses are reflected in their filed rates. Assessment against Iowa-Illinois as well, even though it has no rates on file with the Commission, would result in double charges to the Company (and ultimately to our retail customers) unless such an exemption is provided.

4. In the event no general exemption provision is inserted into proposed Section 159.2a, along the lines above suggested, similar to the exemptions stated in Section 260.7(b) now in

effect, Iowa-Illinois specifically requests exemption therefrom for the reasons stated in paragraph 3 above.

Yours very truly,

/s/ W. B. Waterman

WBW-lc

[37]

SOUTHERN CALIFORNIA EDISON COMPANY
P.O. Box 351
Los Angeles, California 90053

ROLLIN E. WOODBURY
Vice President and General Counsel

December 15, 1970

Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Attention: Mr. Gordon M. Grant
Secretary

Gentlemen:

Re: Docket No. R-408

Pursuant to the notice of proposed rulemaking issued by the Commission November 25, 1970, in Docket No. R-408, inviting the submission of comments with respect to the proposed revision of existing and establishment of new schedules of fees, the Southern California Edison Company respectfully submits herewith its comments.

At the outset, we wish respectfully to direct the Commission's attention to certain respects in which the notice fails to indicate, with clarity and certainty, the position of the Commission with respect to the proposed revisions and its bases, and thus is ambiguous.

1. It is unclear as to whether it is the position of the Commission that "compliance with the spirit of the 1952 Appropriation Act, Executive directives and subsequent Committee recommendations" requires, in its view, special benefits above and beyond those which accrue to the public at large, as a basis for the imposition of charges, or whether it is the position of the Commission that all costs incurred by it, in carrying out its administrative

responsibilities, can be so allocated to the utilities irrespective of any special benefits to the utilities proposed to be taxed with such cost.

a. It is recognized that reference is made in the notice to Budget Circular A-25 setting forth guidelines for the imposition of charges

[38]

" 'to each identifiable recipient for a measurable unit or amount of Government service . . . from which he derives a special benefit'," and then the Commission goes on to state that "These services include agency action which 'provides special benefits . . . above and beyond those which accrue to the public at large' or provides 'more immediate or substantial gains or values . . . than those which accrue to the general public' " (suggesting a recognition of the need for special benefits as a basis for imposing a charge).

b. However, the Commission also states that "The proposed assessments and fees applicable to our functions under Parts II and III of the Federal Power Act are new. Our functions in carrying out the responsibilities imposed under those parts of the Federal Power Act confer benefits upon the recipients." It then proposes a formula allocating all remaining administrative and regulative costs thereunder to the utilities on the basis of gross revenues. If the statement that Parts II and III of the Federal Power Act confer benefits upon the recipients is intended to exclude the general public, it would seem to run counter to the legislative history and the declaration of policy contained in the Act. If, on the other hand, it is intended to include the general public, then there would appear to be an absence of the special benefits contemplated by the governmental directives relied upon.

2. It is unclear from the notice as to whether or not it is the position of the Commission that *all* of its functions under Parts II and III of the Federal Power Act confer special benefits overall to the members of the electric industry above and beyond those which accrue to the public at large.

3. The notice indicates that the Commission has "thoroughly reviewed the existing fee structure and the areas of our administrative operations which have not heretofore been subject to any charges" and that the manner in which allocations should be made with respect to the Commission's functions under Parts II and III of the Federal Power Act

[39]

"has been the subject of much study". The notice then states that the Commission believes "our proposals not only spread those costs fairly and equitably but that they are consistent with the legislative and executive mandates we are required to carry out". However, there is nothing in the notice to indicate what was in the Commission's study to motivate such belief or to support such conclusion. The affected parties, we submit, should be advised of these critical factors, for obviously they need to know the bases of such conclusion in order to evaluate their fairness and propriety. In the absence of such information, we can only express serious doubts that there is any correlation or functional connection between the gross revenues of the public utilities involved and the asserted special benefits. The bases for such doubts include the following:

a. No distinction is drawn in the rule proposed between the gross revenues from resale service, over which the Commission has jurisdiction under Part II of the Federal Power Act, and the gross revenues which are derived from rates over which the FPC has no jurisdiction. In the case of our company, the revenues from rates subject to FPC jurisdiction in 1969 represented only approximately 4.3% of our company's gross revenues, the balance being derived from rates over which the Federal Power Commission has no jurisdiction.

b. No distinction is drawn between utilities whose security issues require Federal Power Commission authorization under Part II of the Act and those who do not.

c. There is no indication in the notice of any correlation between the gross revenues of utilities and the time of the Commission involved in administering Parts II and III of the Federal Power Act, nor of any basis for concluding that gross revenues would be a reasonably appropriate, rather than an arbitrary, basis for allocating such charges.

d. The proposal would have an effect similar to adding an additional tax at the federal level on the investor owned utilities based upon revenues,

[40]

having no demonstrable relationship to the services alleged to be rendered. Furthermore, such a general cost-reimbursable proposal could conceivably tend to erode both the efficiency factor in the carrying on of the functions of the Commission and the budgetary controls of the Congress over such operations.

In addition, it is noted that the proposal suggests increasing filing fees which are to be paid before any Commission service is rendered.

Under these circumstances, we believe the proposed revisions of the Commission's fees are inappropriate, and respectfully request a conference at the Federal Power Commission to discuss the proposed amendments. In this connection, it is suggested that if the interested parties could be furnished with a copy of the study referred to in the notice, upon which the Commission bases its belief that its proposals spread the costs fairly and equitably and consistent with the legislative and executive mandates, a reasonable time before the conference, it could serve to supply the parties with an opportunity to review and evaluate the information that they need to know before the conference and thus could expedite the conference.

The name, title and mailing address of the person to whom communications concerning the proposal should be sent is as follows:

Rollin E. Woodbury
Vice President and General Counsel
Southern California Edison Company
Post Office Box 351
Los Angeles, California 90053

Respectfully submitted,

SOUTHERN CALIFORNIA
EDISON COMPANY

By /s/ Rollin E. Woodbury
Vice President and General Counsel

(53)

[53]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission.	)	Docket No. R-408

COMMENTS OF PACIFIC GAS AND ELECTRIC COMPANY

PACIFIC GAS AND ELECTRIC COMPANY submits these comments in response to the Commission's November 25, 1970 Notice of Proposed Rulemaking in the above-entitled proceeding. All communications in regard to this matter should be addressed to the following persons:

F.T. Searls, Vice President and General Counsel
Malcolm H. Furbush, Assistant General Counsel
Daniel E. Gibson, Attorney
245 Market Street
San Francisco, California 94106

I

The rules proposed here in new Part 36 would attempt to recoup the costs of administering Parts II and III of the Federal Power Act through a scheme of arbitrary fees and assessments. We respectfully submit that this proposed scheme must be revised

[54]

if it is to reflect truly the principle that administrative costs should be borne by those obtaining a special benefit from the expenditure.

II

Under proposed Section 36.2 a schedule of filing fees is prescribed for applications and rate schedule filings under Part II of the Act. The balance of the costs of administering Parts II and III which are not recouped through these filing fees would be recovered by means of the "assessment" provided for in proposed Section 36.1. It is evident that under this scheme a public utility could be assessed for a part of the costs of handling the filings of others even though it has made no rate filings or applications itself, unless some sort of yearly readjustment of filing fees were made so that these fees more nearly approximate the costs of the proceedings out of which they arise.

The balance of Part II and III costs not recouped by the filing fees just discussed would, under the proposed rules, be assessed against each jurisdictional public utility in the same proportion as the individual utility's gross revenues bears to the total of all utilities' revenues. The choice of gross revenues as a basis of this assessment is inappropriate. The costs of administration of Parts II and III of the Act would appear to

[35]

be related more to the number of jurisdictional companies involved than to the gross revenues of each. Administrative costs are probably incurred on a company basis. For instance, the costs of reviewing and compiling statistics from annual report forms is not likely to vary with the size or gross revenues of the reporting company.

If revenues were to be given any consideration in assessing administrative costs, the appropriate revenues to consider would be those from sales subject to the FPC's jurisdiction, rather than the total gross revenues of the public utility. Total gross revenues have no necessary relationship with either the costs of FPC regulation or the benefits received therefrom. FPC jurisdictional revenues, on the other hand, do represent a composite of the quantity and price of the utility's interstate transactions. Thus, it would seem more equitable for this FPC assessment to

be based on such jurisdictional revenues instead of being dependent in large part on the magnitude of local activities which are subject to State, rather than Federal, regulation.

III

It is evident that to apportion costs in accordance with gross revenues of public utilities subject to the Act would not reach a substantial number of those who benefit from the Commission's regulation. Some portions of the Commission's activities may be

[56]

considered to benefit the public in a more general sense. For instance, FPC regulation is frequently invoked on behalf of publicly-owned power systems. Under these circumstances it would appear that Budget Circular A-25 would call for recovering the related cost from taxpayers as a normal cost of government. To the extent that the general public is deemed to benefit, we would suggest that the Commission should exclude a portion of its costs from those to be recovered from public utilities. Certainly the gross revenue allocation approach would only compound the inequity which would otherwise result because it leaves out some of the major beneficiaries of Commission regulation.

Respectfully submitted,

/s/ F.T. Searls

F. T. SEARLS
Vice President and General Counsel
Pacific Gas and Electric Company
245 Market Street
San Francisco, California 94106

[78]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	:	Docket No. R-408

COMMENTS BY PUBLIC SERVICE ELECTRIC AND GAS COMPANY ON PROPOSED RULEMAKING

Public Service Electric and Gas Company submits these comments in response to Notice of Proposed Rulemaking issued November 25, 1970, by the Federal Power Commission concerning New Schedules of Fees and Annual Charges to be Paid by Electric Public Utility Companies and Natural Gas Companies.

The proposal that an annual assessment be imposed to recover administration costs in the opinion of the Company does not appear to have been contemplated by Congress. The

[79]

pertinent provisions of the Independent Offices Appropriations Act for the year ended June 30, 1952 as set forth on page 2 of the proposed rulemaking docket do not refer to administration costs as such. Rather it seems to be the sense of the Congress to authorize the Federal agency concerned to prescribe fees or charges with respect to services or benefits which are performed by the agency with respect to the company served or benefitted. Thus the costs we believe Congress intended to be recovered are those

costs which are identifiable with a value to the recipient or interest served as referred to in the Act which is set forth on page three of the Notice. In addition, the proposed method for determining the annual assessments is not equitable, because for certain utilities, revenues and gas deliveries are predominantly intrastate and these utilities are required to pay significant amounts of administration costs to state commissions. A more equitable method would be to base the apportionment on the proportion the utility's interstate revenues bear to total interstate revenues. In the case of natural gas companies, interstate

[80]

deliveries should be used. It should be noted that the impossibility of developing a completely equitable formula for determining annual assessments, based on the value of the service, to recover administration costs supports the contention of the Company that Congress did not intend that administration costs should be completely recovered. The benefits and services which are derived from administrative agencies inure to members of the general public as well as to customers of the companies regulated and, therefore, it is proper that a portion of the costs should be recovered from tax monies.

For example, Public Service would be assessed an inequitably large portion of the Federal Power Commission administration costs if they are, as proposed, based upon gross revenues since Public Service's retail operations are entirely within the State of New Jersey and thus would require much less administrative effort on the part of the F.P.C. than would be required for an interstate operating and/or holding company. A more equitable assessment would

[81]

allocate costs on the basis of services actually rendered by the F.P.C.

The Notice suggests the possibility of a conference at the Federal Power Commission to discuss the proposed amendments.

In the event such a conference is held the Company requests that it be permitted to participate.

Respectfully submitted,

/s/ Edward S. Kirby

Edward S. Kirby
Attorney for Public Service
Electric and Gas Company
80 Park Place
Newark, New Jersey 07101

Dated: Newark, New Jersey
January 15, 1971

(82)

[82]

NEW ENGLAND POWER SERVICE COMPANY

20 Turnpike Road, Westboro, Mass. 01581

January 19, 1971

Federal Power Commission
Washington
D. C. 20426

Re: Docket No. R-408
(Revision of Existing and Establishment of New Schedules of Fees, etc.)

Dear Sirs:

The following comments are submitted on behalf of the electric subsidiaries of New England Electric System, namely, Granite State Electric Company, Massachusetts Electric Company, The Narragansett Electric Company and New England Power Company. Though the undersigned on behalf of said companies does not request a conference on these comments, if it be the wish of the Commission or its staff, we would be willing to confer. However, if there is to be a general conference or hearing on the proposed schedules of fees, set forth in the above docket, we request to be notified and given the opportunity to participate. Communications should be sent to the undersigned at the address on the letterhead above.

As set forth in the Notice of Proposed Rulemaking, dated November 25, 1970, the statutory basis for the proposal is set forth in 31 USC 483a, 65 Stat. 290 (1951). Though this statute has been construed by the Commission to permit the establishment of fees with respect to specific applications to the Federal Power Commission (see FPC Order No. 317, Docket R-282, 31 F.R. 430, 35 FPC 30, 1966, order adopting a schedule of fees for specific applications by natural gas companies under the Natural Gas Act), it is submitted that such does not authorize the assessment of annual charges for general administration by the

Commission of Parts II and III of the Federal Power Act. In fact, the Commission itself in 1965 so indicated when it was proposing the abovementioned fee schedule for natural gas companies. According to Release No. 14025 dated September 15, 1965, 30 F.R. 12077, the Commission said that it had "reviewed its other functions under the Federal Power Act and Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies." (In said release the Commission had noted it already imposed fees in connection with licenses for hydroelectric power projects.)

Assuming arguendo that there is a statutory base for the proposed fees and annual charges, we respectfully submit the following comments:

1. The flat provision in proposed Section 36.3 that "no fees will be refunded" utterly fails to meet the fair and equitable standard in 31 USC 483a. For example, it is not uncommon for rate schedules upon or shortly after filing to be rejected or withdrawn on grounds that the application is not complete or that the filing is not timely or appropriate, e.g., a rate schedule filed during a period of suspension of a previous filing. In the event of a major rate case, a fee of upwards of $55,000 would be lost to the filing utility and the cost of administration for a quick review to determine the completeness or acceptability of the application would not have exceeded some small, minimal amount. Other regulatory agencies do provide a refund of fees in the event of rejected or withdrawn filings. See, for example, the Fee Schedule adopted by the CAB as set forth in 14 CFR, Section 389.20 et. seq., especially Section

((83)

389.25(a)(1); the FCC Fee Schedule at 47 CFR, Section 1.1101 et. seq., especially Sections 1.1104 and 1.1105; and the ICC Fee Schedule at 49 CFR, Section 1002, especially Section 1002.2(b).

[84]

It is suggested that the Commission refund filing fees for applications which are rejected for filing by the Commission as incomplete or for any other reason. See the ICC Fee Schedule at 49 CFR, Section 1002.2(b). If the Commission determines that it is necessary to retain some minimum filing fee even for rejected applications to defray the cost of routine processing then it is suggested that the Commission adopt a two tier fee system similar to that used by the CAB at 14 CFR, Section 389.25 (a)(1) and (a)(2), a relatively low nonrefundable initial filing fee for an application followed by a later higher license fee to be paid only if a license or permit is granted.

2. A flat fee for a specific application, whether or not the application would involve a public hearing and protracted proceedings, fails to meet the fair and equitable standard in 31 USC 483a. This is particularly true with respect to rate filings applying only to sales of electric energy between affiliated companies. In such cases there generally is substantially less likelihood of protracted public proceedings.

3. The provision of proposed Section 36.1 for the assessment of public utilities for the costs of administration of the regulatory and interconnection and coordination programs under Parts II and III of the Federal Power Act fails to meet the fair and equitable standard on several bases, including:

   (a) The automatic assessment of all such costs would place the burden of bearing such costs on the public utilities irrespective of the reasonableness

of the Commission's administrative programs or the extent thereof. It is a blank check for the Commission, with Congressional authorization, to undertake whatever program it desires at the expense of the utilities without any opportunity for utilities, other than appearing annually at Congressional appropriation

[85]

hearings, to test the specific application of the statutory factors set forth in 31 USC 483a for determination of what is fair and equitable. As a minimum, some aggregate dollar amount to be paid by the utilities should be established by the Commission, after opportunity for such utilities to question said amount. Once this aggregate amount is fixed, it should not be revised without further opportunity for hearings.

(b) By assessing public utilities for all costs other than those covered by specific fees, utilities in general would bear the costs of complex, litigated cases for which the established fees are inadequate to cover average full costs. Admittedly, the setting of a standard fee for the average case is appropriate rather than to assess costs for each such case. But, unless there be specific fees for the complex, litigated cases, an undue burden is assessed through the annual charges on all utilities.

(c) The method of allocation of the annual charges among the respective public utilities, as set forth in proposed Section 36.1(b), is not fair and equitable. By basing the allocation on the respective gross revenues of the public utilities, some of the consequences would be:

(i) A fully integrated public utility operating within one state would have only a small percentage of its gross revenues derived from jurisdictional sales under the Federal Power Act. Its primary regulation would be by a State commission with respect to its non-FPC jurisdictional business. On its business subject to regulation by the State in which it is

[86]

located it should not have to bear the FPC costs of administration of Parts II and III of the Federal Power Act on the same basis as a company such as New England Power Company whose sales, with small exceptions, are all jurisdictional under the Federal Power Act.

(ii) However, if the assessment of the annual charges is amended to conform to a suggestion just made in (i) above, some further adjustment will be necessary to avoid an unfairness with respect to a largely jurisdictional company such as New England Power Company. Some 90% of New England Power Company's sales are made to affiliated companies in the same holding company system. These sales should be excluded from its gross revenues in determining what portion of annual charges should be assessed on New England Power Company. Otherwise it would be bearing a disappropriate amount of the general charges of the Commission as compared to other utilities around the country. The area wherein New England Power Company might be charged more than a fully integrated utility operating

within one State would be in connection with the specific applications and fees that New England Power Company would be filing and paying with respect to specific jurisdictional matters.

4. The proposals for fees relating to rate schedules are deficient with respect to the following:

[87]

(a) No basis is set forth for the computation of the amount of increase involved in the rate filing. Is it to be a computation based on some past 12-month period, some future 12-month period, some future 12-month period, or some other period.

(b) The subdivision of rate filings as set forth in proposed paragraphs (e), (f) and (g) of proposed Section 36.2 will result in confusion and administrative problems in determining which category is applicable. It is suggested that all three be combined into one with a set fee of, say, $300. If the three categories are not combined, serious consideration should be given to the adoption of an internal FPC appeal and review procedure over the staff's fee determination in disputed cases, similar to the system employed by the CAB as set forth in 14 CFR, Section 389.23.

5. It should be made clear that the fees for specific applications are to be assessed only with respect to the original application and that amendments would not require the payment of any additional fee unless the scope of the subject of the application be substantially altered.

6. Without any provision for varying the amounts of fees dependent upon the relative importance of the particular applications, the fee schedule is not fair and equitable. For example, what is fair and equitable in assessing a

$10,000 fee for an application to merge utilities irrespective of their size? Why, for example, should two Class B utilities be required to pay upon application for merger the same fee as two utilities with revenues of $1 or $2 million or more?

Another example is the $500 fee for all corporate applications other than those for which fees are set forth. Normally the catch-all fee is the smallest of a list of set fees for specific applications. Presumably, all major applications would have fees

[88]

established for them. For example, it is difficult to see why an application under Section 203(a) for a simple, uncontested transfer of a jurisdictional facility with a value of only $80,000 from one public utility to another at its net original cost and involving no dispute between the parties nor the Commission's staff should carry a fee of $500 when an application of a compulsory physical interconnection under Section 202(b) would presumably involve controversy and yet calls for a fee of only $150.

It is respectfully submitted that the above comments in themselves indicate that the adoption of the proposed schedules of fees set forth in the Notice of Proposed Rulemaking issued November 25, 1970 would be unfair, inequitable and illegal.

Very truly yours,

/s/ Richard B. Dunn

Richard B. Dunn
Vice President and General Counsel

[91]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	))))))	Docket No. R-408

COMMENTS OF LOUISIANA POWER & LIGHT COMPANY

Louisiana Power & Light Company (LP&L) respectfully submits the following comments in response to the Notice of Proposed Rulemaking of the Commission in this proceeding issued November 25, 1970. The person to whom communications concerning the proposal should be addressed is:

J.M. Wyatt, Senior Vice President
Louisiana Power & Light Company
142 Delaronde Street
New Orleans, La. 70114

In the Notice the Commission stated that it proposed to add to the charges which is has been collecting for many years under Part I of the Federal Power Act a number of additional charges for administering Parts II and III of the Act. As a basis for these additional charges the Notice cited Title V of the Independent Offices Appropriations Act for 1952. The reliance upon that Act was necessary because Section 10 (c)

[92]

of Part I of the Power Act specifically provides for the payment of annual fees for administering that Part, while neither Parts II nor III contain such provisions.

(92)

It is respectfully submitted that this reliance on the Independent Offices Appropriations Act is misplaced. This Act contemplates charges for specific items of work, publication or document, or where a service performed by a government agency confers a special benefit only on the recepient and not to the public as a whole.

It is these specific items which "shall be self-sustaining to the full extent possible", not the entire operation of major activities of an agency. We therefore respectfully submit that that portion of the proposed amendment which provides for adding, in Part 36.1, a recovery of the total cost "of administration of the Commission's public utility regulatory and interconnection and coordination programs" under Parts II and III exceeds the intent of the quoted provision of the Independent Offices Appropriations Act. Whatever additional fees and charges are to be levied should be limited to specific charges for specific services or documents, not extended to a general recovery of costs of administration on an unrestricted basis.

The primary purposes of Parts II and III are general in nature and not for the special benefit of any person including the utility which is regulated. This was recognized by the Commission in its Notice of Proposed Rulemaking issued September 15, 1965 in Docket No. R-282, a proceeding which culminated in the establishment of fees for certain applications under the Natural Gas Act. The Commission

[93]

stated at page 2 of that notice that it had considered the questions of fees for administering Parts II and III of the Federal Power Act as well as the Natural Gas Act:

> "The Commission has reviewed its function under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment for user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel

rate and accounting provisions of the Natural Gas Act would not be appropriate *since these activities are primarily for the benefit of the general public rather than the regulated companies.*" (Emphasis supplied)

It is submitted that nothing has happened since 1965 to change this eminently sound conclusion. It is further noted that identical benefits of the Commission's activities accrue to entities transmitting and selling electric energy against whom no such annual fee would be assessed, such as publicly-owned power systems. A double discrimination exists in the proposed apportionment of costs that includes benefits rendered to such entities but fails to recover any amount from them.

The Notice proposes a two step procedure. Specific charges are made for individual applications; and "to recoup the remaining costs" of the regulatory program, an amount will be levied on an annual basis on the "gross revenues" of each company subject to the Commission's jurisdiction. This latter assessment is improper for several additional reasons.

First it is a clear violation of the Congressional admonition that only special benefits should be charged to a regulated company. Because the annual charge would be based upon gross revenues

[94]

it would bear absolutely no relationship to any service performed by the Commission. In substance, it is the equivalent of a gross receipts tax collected by, and for the benefit of the Commission. The law confers no such power on the Commission, entirely aside from the question of the unsoundness of an administrative body having an unlimited right to make levies to recoup whatever its budget deficit may be.

Finally the use of total-system gross revenues in calculating the annual assessments is wholly inappropriate. If for any reason revenues could be taken into account in assessing administrative

costs, the only logical method would be to consider only those revenues derived from sales subject to FPC regulatory jurisdiction.

"Gross revenues," as used in proposed Section 36.1 (b) is not defined, and might be construed to include retail operating revenues which are not subject to a regulatory jurisdiction of the Commission, forfeited discounts, rent from electric property, and other miscellaneous service revenues, as well as other non-jurisdictional revenues. For the year 1969, the total electric operating revenues of LP&L were $136,490,775, while its bulk power supply sales from associated and non-associated utilities amounted to $20,548,841 or 15.1 per cent of the total, and its sales for resale to municipalities and cooperatives amounted to $3,826,604 or 2.8 per cent of the total. The sales for resale that are subject to Commission regulatory jurisdiction then amounted to only 17.9 per cent of the total electric operating revenues of the Company.

[95]

Accordingly, if the Commission is lawfully able to assess any such annual charge, LP&L should be assessed only on the basis of the revenues referred to in the schedule of "Electric Operating Revenues" in account 447, "Sales for Resale," of FPC Form 1. It is submitted that the term "gross revenues" in Section 36.1 (b) be defined as "revenues subject to the regulatory jurisdiction of the Commission on an annual basis as reported to the Commission."

For the foregoing reasons it is submitted that the proposed assessment of fees relating to the Commission's functions under Parts II and III of the Federal Act is without foundation in law, and wholly at variance with all principles for the orderly administration of government.

If a conference on this proceeding is held, it is requested that the undersigned be given notice thereof.

Respectfully submitted,
Louisiana Power & Light Company

By:
/s/ J.M. Wyatt
Senior Vice President

DRAFT
EMN:mal
1/18/71

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	)	Docket No. R-408

COMMENTS OF THE
EDISON ELECTRIC INSTITUTE

The Edison Electric Institute (Institute), the trade organization of the investor-owned electric public utility industry, submits these comments in response to the Notice of Proposed Rulemaking which was issued by the Federal Power Commission (Commission) as Docket No. R-408 on November 25, 1970.

The comments are responsive to the proposals set forth in the Notice to amend Part 3 of the Commission's General Rules and to amend Part 32, Part 33, Part 34, Part 35 and Part 45 of, and add a new Part 36 to, the Commission's Regulations under the Federal Power Act.

The Institute agrees that it would be appropriate for the Commission to collect a fair and equitable fee from a utility it regulates when it provides a service to or for that utility. However, the Institute does not believe that it is lawful or appropriate for the Commission to allocate among all of the utilities it regulates all other costs of administration of Part II and Part III of the Federal Power Act (Act) as is contemplated in proposed Section 36.1.

[105]

Title V of the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 USC 483 (a)) authorizes federal agencies to prescribe fees, charges and prices to be collected for the performance by them of certain specified activities. It further requires that those fees, charges and prices be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . ." Since the annual charge which would be prescribed by proposed Section 36.1 is not related to specified activities and is not fair and equitable, it is not a charge authorized by Title V.

Title V requires that for a charge to be fair and equitable it must be reasonably related, inter alia, to the interest served. Many of the Commission's regulatory activities under Part II and Part III of the Act are primarily for the benefit of the general public rather than the utilities it regulates.

The Commission's activities in these regards benefit the general public, including all segments of the electric utility industry, investor-owned, government-owned and cooperatively owned, those the Commission regulates and those it does not. It seems apparent, therefore, that these activities should be paid for primarily from tax revenues appropriated by Congress and spent by the Commission under Congressional control.

Without compromising in any way its position in opposition to the proposed annual charge, the Institute also wishes to point out some ambiguities and inequities in proposed Section 36.1. The effective date of the

[106]

assessment of the initial annual charges is unclear. The use of gross revenues of public utilities as the basis for allocation seems unjustified and unjustifiable. There obviously are activities omitted from proposed Section 36.2, such as intervention, for which the Commission could and should prescribe fees.

(106)

This raises a broader question in connection with proposed Section 36.2. For what activities should the Commission prescribe specific fees? The Institute also questions the level of fees. Access to the "historic costs" mentioned in the Proposed Rulemaking might be helpful. Finally, the Institute questions the appropriate uses of the sliding scale proposed for major rate increases.

The Institute therefore respectfully requests a conference at the Commission to discuss the Proposed Rulemaking. Some of the principal issues which could be discussed at such a conference appear to be as follows:

1. Which of the Commission's activities under Part II and Part III of the Act are primarily for the benefit of the regulated utilities and which are primarily for the benefit of the general public?

2. Does proposed Section 36.2 include all of the activities of the Commission under Part II and Part III of the Act which are primarily for the benefit of the regulated utilities and exclude all that are primarily for the benefit of the general public?

3. Is there any way, under the Act and Title V, to prescribe fees to cover all or any part of the cost of Commission activities under Part II and Part III of the Act which are not primarily for the benefit of the regulated utilities?

4. Are the fees set forth in proposed Section 36.2 reasonably related to the costs to the Commission of performing the activities to which they relate?

[107]

The name, title and mailing address of the person to whom communications concerning this Proposed Rulemaking should be addressed is

Mr. W. Donham Crawford
President
Edison Electric Institute
750 Third Avenue
New York, New York 10017

Respectfully submitted,
Edison Electric Institute

By:
/s/ W. Donham Crawford
President

January 21, 1971

(111)

COLUMBIA GAS SYSTEM SERVICE CORPORATION

Richard A. Rosan
Senior Vice President
and Counsel

20 Montchanin Road
Wilmington, Del. 19807

January 20, 1971

Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Re: Docket No. R-408: Revision of Existing and Establishment of New Schedules of Fees

Gentlemen:

Columbia Companies* hereby respond to the Commission's Notice of Rulemaking, dated November 25, 1970, in the above-entitled matter and have the following comments:

Columbia Companies submit that the thrust of the proposed rulemaking herein is to change substantially the concept of user charges from (a) a procedure whereby the identifiable recipients of services are charged for the costs of services to (b) a procedure whereby the industry at large, whether specifically benefited or not, must underwrite the total costs of administering the Natural Gas Act. We are unable to find authorization for such change.

The Commission's Notice cites the enabling legislation, namely Title 5 of the Independent Offices Appropriation Act (31 USCA 483a). It should be noted, however, that this enabling legislation is expressly "subject to such policies as the President may prescribe". (Id.) The pertinent policies which the President has prescribed are contained in Circular No. A-25 issued by the Bureau

*The Ohio Fuel Gas Company, United Fuel Gas Company, Kentucky Gas Transmission Corporation, Columbia Gulf Transmission Company, Atlantic Seaboard Corporation, The Manufacturers Light and Heat Company, Cumberland and Allegheny Gas Company and Home Gas Company

of the Budget in the name of the President on September 23, 1959. There it

[112]

is stated as a matter of "general policy" that "a reasonable charge . . . should be made to each identifiable recipient for a measured unit or amount of government service from which he derives a special benefit". This Circular clearly recognizes that part of the administration of the Natural Gas Act is not directly related to the natural gas industry; and, thus, should not be assessed against the natural gas industry. This recognition is expressed in the Circular as follows:

> "No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public . . ." (Id., mimeo page 2, paragraph 3(a)(2))

Thus, since the bulk of administrative costs are not so identifiable, they should be recovered from the public generally, as part of the cost of government, and not from the natural gas industry.

Moreover, the concept of administrative convenience of assessing pipelines for the alleged "benefits" accruing to producers through the certification of gas contracts illustrate dramatically how far the Commission has deviated from the express terms and concepts of the Circular.

Therefore, we respectfully submit that proposed paragraph 159.2a(b) is improper, and should not be effected as a rule. For similar reasons and because natural gas companies are not "the parties benefited", we submit that proposed paragraph 159.2a(c) should also not be promulgated as a rule of this Commission.

* * *

Assuming, *arguendo,* the Commission has the authority to recover *all* its costs of administering the Natural Gas Act as proposed in this docket, we submit that the charges against

natural gas companies should be calculated so the entire costs of administering the Natural

[113]

Gas Act should be allocated pursuant to a single formula. If the Commission's administrative costs are to be borne by natural gas companies and are to be recovered in rates on a current basis, they should not be subject to extreme variations. Charges based upon certifications will continue to fluctuate widely because construction varies from year-to-year. Charges based upon attachments of natural gas reserves will fluctuate more widely because reserves are not added in predictably even quantities. For instance, United Fuel added over six trillion cubic feet of reserves in one year (on which the fee would be $600,000) and in some years has added only a half trillion cubic feet of reserves (on which the fee would be $50,000). Such extreme variations would inevitably make it impossible for United Fuel to recover these fees in rates.

It would seem that the appropriate method of assessing general costs to all Class A and Class B natural gas companies is the net asset value of jurisdictional properties. This is a readily determinable figure subject to neither the fluctuations nor the ambiguities inherent in the term "deliveries". Also, net asset value of jurisdictional properties criteria, would eliminate any imbalance of fee burden on the ultimate consumer which would be occasioned merely by the number of pipeline companies between the source of gas and the burner tip. Moreover, since general regulatory problems are important only as they govern cost determinations, it seems on balance, that a fairer measure for allocating regulatory costs is by net jurisdictional assets.

Therefore, we respectfully submit, in the alternative and on the jurisdictional assumption noted herein-before, that Paragraph B of the proposed rulemaking Notice setting forth proposed amendments to Part 159, Subchapter E–Regulations Under the Natural Gas Act, Chapter I, Title 18 of the Code of Federal Regulations be deleted and that in lieu thereof the Commission

provide that reasonable annual charges will be assessed by the Commission against Class A and Class B natural gas companies to reimburse the United States for costs of administration of the Natural Gas Act, such assessment to be in the proportion of their net jurisdictional assets.

[114]

We respectfully request that if a conference is held in this proceeding, Columbia Companies be afforded the opportunity to participate therein. The name and mailing address of the persons to whom communications should be sent regarding this proceeding are:

Richard A. Rosan, Esquire
20 Montchanin Road
Wilmington, Delaware 19807

Daniel L. Bell, Jr., Esquire
20 Montchanin Road
Wilmington, Delaware 19807

William C. Hart, Esquire
1625 Eye Street, N.W.
Washington, D.C. 20006

Respectfully submitted,
Columbia Gas System Companies

By:
/s/ Richard A. Rosan

(131)

[131]

AMERICAN ELECTRIC POWER SERVICE CORPORATION
HERBERT B. COHN
Executive Vice President
Administration and Corporate Services
2 Broadway, New York, N.Y. 10004
(212) 422-4800

January 20, 1971

Federal Power Commission
Washington, D.C. 20416

Attention: Hon. Gordon M. Grant, Secretary
Gentlemen:

Re: Docket No. R-408

The following comments are filed by American Electric Power Service Corporation on behalf of Appalachian Power Company, Indiana & Michigan Electric Company, Kentucky Power Company, Kingsport Power Company, Michigan Power Company, Ohio Power Company and Wheeling Electric Company, pursuant to the Notice of Proposed Rulemaking in the subject docket promulgated by the Commission on November 25, 1970.

The undersigned agree that, within appropriate limits, it is not unreasonable that Federal regulatory agencies establish and collect fees from parties seeking relief or authorization from the Commission in such amounts as will produce revenue generally equivalent to the cost incurred by the Commission and its staff in processing such applications. The undersigned believe, however, that, for the reasons described in the following comments, certain of the proposed fees and charges do not accomplish the Commission's purpose of establishing a "fair and equitable" method of recovering costs of the Commission.

[132]

COMMENTS

I. *Section 36.1 – Annual Charges*

Section 36.1 provides for annual charges to be assessed

against "each public utility" presumably to cover costs of those instances of the Commission's exercise of its jurisdiction which are not covered by any one of the charges established in Section 36.2, such as the Commission's regulatory, interconnection and coordination programs. Section 36.1 provides that the amount assessed against each public utility to cover such cost shall be based on a ratio of the gross revenues of each such public utility to the sum gross revenues of all public utilities for the test period. We do not believe this is fair and equitable.

A. *Total Cost of Commission's Activities Should Not be Recovered from Utilities and Their Customers:* Some of the varied functions carried out by the Federal Power Commission, including the providing of information to the public, as well as some of the Commission's ever-expanding functions in the ecological field, are of such a nature that the cost thereof should be borne by all of the taxpayers, rather than by utilities and their customers. As a result, it is submitted that it would be unreasonable to require the electric utility industry to be assessed for all costs incurred by the Commission which are not covered by specific charges assessed in connection with specific types of applications.

B. *Limitation of Annual Charges to "Public Utilities":* The undersigned believe that to limit the assessment of charges under Section 36.1 to "public utilities" is unreasonable. The guidelines contained in Budget Circular No. A-25, relied upon by

[113]

the Commission in its proposed rulemaking, indicate that charges should be imposed "to each identifiable recipient for a measurable unit or amount of Government service . . . from which he derives a specific benefit" such as ". . . special benefits . . . above and beyond those which accrue to the public at large . . ." or "more immediate or substantial gains or values . . . than those which accrue to the general public . . ." or where such service is "performed at the request of the recipient and

is above and beyond the services regularly received by other members of the same industry or group, or of the general public . . ."

Yet, limiting the assessment of annual charges against "public utilities," which is defined in Section 201(e) of the Federal Power Act as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this part," would appear to eliminate the assessment of any charges against others who initiate proceedings which may involve substantial costs for the Commission for the purpose of deriving direct and substantial benefits far above and beyond benefits available to the general public from the action sought to be taken by the Commission in such proceedings. An obvious example is a proceeding, such as the "City of Paris" or "Crisp County" proceedings, initiated by a distribution system, or a municipally or cooperatively owned electric system which is not regarded as a "public utility" under the Federal Power Act. In recent years, much of the Commission's time and effort and, we presume, a substantial portion of the Commission's budgeted funds, have been devoted to interconnection and coordination proceedings initiated by such municipally and cooperatively owned utilities.

[134]

The applications in such proceedings have generally sought to use the Commission's processes to obtain special benefits for the applying municipally and cooperatively owned utilities above and beyond those which accrue to the public at large and, where granted, such proceedings cannot help but result in "more immediate or substantial gains or values" to such applicant than those which accrue to the general public. On the basis of the foregoing, the undersigned believe that, in fairness and equity, and if the Budget Bureau's guidelines are to be complied with, charges associated with such proceedings should be assessed directly against the applicant in such proceedings who will receive the benefit, assuming the proceeding is well founded, and who should be responsible for the costs incurred if the relief sought is not granted by the Commission.

C. *Assessment of Annual Charges on the Basis of Gross Revenues:* FPC's jurisdiction under Part II of the Federal Power Act over public utilities such as the undersigned is based in general on the portion of such utilities' business (in terms of revenue) which is made up of sales for resale in interstate commerce. In the case of the undersigned, the revenue from sales for resale in interstate commerce amount to a relatively small portion of gross revenue. For the year 1969, in the case of Appalachian Power Company, Indiana & Michigan Electric Company and Ohio Power Company, sales to ultimate customers, which are not subject to the Commission's jurisdiction, and gross revenue were as follows:

	Sales to Ultimate Customers	Gross Revenue
Appalachian Power Company	$157,028,000	$182,929,000
Indiana & Michigan Electric Company	112,659,000	148,882,000
Ohio Power Company	210, 984,000	244,374,000

[135]

Thus, in the case of Ohio Power Company revenue from sales for resale – $29,916,000 – accounted for less than 13% of gross revenues in 1969 and involved service to 25 out of a total of 527,573 customers as of the end of 1969. In the case of Appalachian and I&M revenue from sales for resale represented 13.3% and 23.4% of gross revenue, respectively. Furthermore, revenues from sales to ultimate customers, subject to the jurisdiction of state regulatory agencies, frequently form the basis of charges assessed by these state agencies to offset the cost of such state commission regulation. Basing the proposed FPC annual charges on gross revenue would therefore, in many instances, result in double payment of charges on the basis of revenues from ultimate customers, which is not fair, equitable and (since FPC has no jurisdiction over such business) necessary under any standard with which we are familiar.

(135)

As a result, it is submitted that the formula to recoup costs of the Commission's regulatory program, other than those for which specific fees are established, should be based only on revenues of that portion of each of the utility's business subject to the Commission's jurisdiction and not on the gross revenues of each of the utilities.

II. *Section 36.2(e), (g) and (h) – Fees in Connection with Rate Filings*

Subsections (g) and (h) of Section 36.2 provide for a sliding scale of fees in connection with rate schedule filings involving rate increases. On the other hand, Subsection (e) provides a flat $100 fee for rate schedule filings other than those involving rate increases.

The complexity and resulting cost to FPC of rate increase filings do not depend on the amount of money involved in such rate increases. Rather, the complexity of such proceedings depends primarily on whether or not formal proceedings, *i.e.*, hearings,

[136]

pretrial conferences, negotiating conferences, etc., are held, the degree of Staff preparation therefor and participation therein and the length thereof. The complexity of the system involved and of the rates will also have some effect. The cost to the Commission of rate increase proposals involving similar formal proceedings and a similar degree of Staff preparation and participation initiated by a specific utility should be approximately the same regardless of whether the rate increase requested is $1,000,000, $5,000,000 or $10,000,000. On the other hand, processing a $1,000,000 rate increase proposal involving a full dress hearing with Staff participation should be more burdensome and expensive for the Commission than a $5,000,000 rate increase proposal where no hearing is required or where Staff participation is minimal. The complexity of the applying system and of its rate structure will also not necessarily vary with the amount of increase in rates proposed. On the basis of the foregoing, it would

appear that a scale of fees related to whether or not there is a hearing, number of hearing days and degree of Staff participation in connection with a rate proceeding would appear to be a far more equitable means of ascertaining the fee to be charged in connection with such a proceeding than the sliding scale, based on the amount of increase sought, presently proposed.

The $100 fee proposed for rate schedule filings other than rate increases in Subsection (e), while adequate for voluntary decreases in rates sought to be published by utilities, is clearly inadequate in the case of proceedings for involuntary rate decreases brought by wholesale customers of a utility company. As the Commission is well aware, such involuntary rate reduction proceedings can drag on and

[137]

involve equally as much or more time, effort and cost on the part of the Commission and its Staff than rate increase proceedings. When a rate reduction proceeding results in a decrease in rates, benefitting solely the applicant and its customers, and equally when the proceeding does not result in a reduction of rates and therefore its initiation was not justified, the costs associated with such a proceedings should in fairness and equity be borne by the party seeking the rate reduction.

It is therefore respectfully submitted that a scale of fees substantially similar to that established for rate increase proceedings be established for involuntary rate reduction proceedings to be assessed against the party filing the application for an involuntary rate reduction.

III. *Fees for Applications to Hold Interlocking Positions*

Section 36.2(i) would impose a fee of $100 for applications under Section 305(b) of the Federal Power Act. Section 305(b) was adopted to subject to regulation interlocking directorships and senior officerships between unaffiliated utilities, utilities and utility equipment manufacturers and utilities and underwriters of utility securities. In systems such as the American Electric Power System, there are necessarily a large number of

such interlocking positions, which do not require the same degree of regulatory scrutiny, if indeed they were intended to be regulated at all, as do interlocks between utilities not operated under common control or ownership pursuant to authorization of the Federal Power commission or the Securities and Exchange Commission.

The undersigned respectfully submit that the Commission could save itself a great deal of time, expense and effort if it were to amend its "Part 45 – Application for Authority to Hold

[138]

Interlocking Positions" regulations. Part 45 is promulgated under Section 305(b) of the Federal Power Act, which, in pertinent part, provides:

> "... it shall be unlawful for any person to hold the position of officer or director of more than one public utility ... unless the holding of such positions shall have been authorized by order of the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby."

Under present practice, officers and directors of utilities within a holding company system are required to make formal application, a document of some ten pages in length, to hold an additional position within the same system. The same application must be filed and the same procedure followed, where the positions involved are in utilities operated under common control pursuant to FPC or SEC authorization, as is required where positions in unaffiliated utilities are involved. Indeed, the fact that the Federal Power Commission has previously authorized the applicant to hold other positions within the same system is also not considered sufficient precedent to obviate the need for another long form application.

It is submitted that, where utility companies are operated under common control pursuant to FPC or SEC authorization, the evils which this portion of Section 305(b) was intended to

prevent cannot arise and public or private interests cannot be adversely affected. Numerous such application are filed with the Commission each year and valuable time of the companies and the Commission Staff is spent in working over such applications. We believe this is highly wasteful and the proposed $100 fee for each such application proposed would constitute a further unnecessary burden on the companies and their customers.

[139]

The Interstate Commerce Commission, faced with precisely the same situation under virtually identical statutory provisions, recognized that private and public interests would not be adversely affected by interlocking officers and directors of carriers operated under common control pursuant to ICC authority and, by order dated May 1, 1970 in Ex Parte No. 260, eliminated this unnecessary burden on the carriers and on its own processes. The pertinent part of Section 20(a) (12) of the Interstate Commerce Act, which governs authorization for interlocking positions, provides:

> "... it shall be unlawful for any person to hold the position of officer or director of more than one carrier, unless such holding shall have been authorized by order of the Commission, upon due showing, in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby."

ICC, in a rulemaking proceeding, gave blanket authorization for interlocking positions, provided the positions were in carriers which were lawfully operated under common control or management pursuant to approval and authorization of the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act or pursuant to a control relationship existing since before June 16, 1933. (See ICC Order dated May 1, 1970 in Ex Parte No. 260, a copy of which is attached hereto as Appendix A for the convenience of the Commission.)

Blanket authorization should be granted by the Federal Power Commission under Section 305(b), after notice, through

(139)

a rulemaking proceeding, such blanket authorization to be limited to positions held in utilities which are lawfully operated under common control or management pursuant to approval and authorization of the FPC under Section 203 of the Federal Power Act or of the SEC pursuant to Sections 9, 10 and 11 of the Public Utility Holding Company Act of 1935.

[140]

Such blanket authorization would clearly be in the public interest and would obviate the burden presently placed on FPC and its Staff in connection with most of the Section 305(b) applications presently submitted to it. The proposed rulemaking recommended herein would also obviate the unnecessary expense of the proposed $100 fee to these companies and eliminate as well the burdensome paper work involved.

Very truly yours,
American Electric Power Service
Corporation
on behalf of
Appalachian Power Company
Indiana & Michigan Electric Company
Kentucky Power Company
Kingsport Power Company
Michigan Power Company
Ohio Power Company
Wheeling Electric Company

By
/s/ Herbert B. Cohn
Executive Vice President

HBC:dw
Attachment

[141]

APPENDIX A

FEDERAL REGISTER, VOL. 35, NO. 96, MAY 16, 1970

TITLE 49 – TRANSPORTATION

Chapter X – Interstate Commerce Commission

Subchapter B – Practice and Procedure

[Ex Parte No. 260]

PART 1112 – INTERLOCKING OFFICERS

Miscellaneous Amendments

Order. At a general session of the interstate Commerce Commission, held at its office in Washington, D.C., on the 1st day of May 1970.

It appearing, that the Commission, on November 20, 1969, issued a notice of proposed rulemaking in this proceeding, under authority of sections 4 and 12 of the Administrative Procedure Act (5 U.S.C. 553 and 559) and sections 12, 17, and 20a(12) of the Interstate Commerce Act, for the purpose of considering whether a rule proposed by the Association of American Railroads, making the existing regulations inapplicable to persons holding or proposing to hold certain interlocking positions, should be adopted and supplemented by a blanket authorization for the holding of such positions;

It further appearing, that notice to all interested parties was given through publication of said notice in the FEDERAL REGISTER of December 9, 1969 (34 F.R. 19471-19472), and interested parties were invited to submit views and suggestions regarding the proposed rule and

It further appearing, that various parties submitted views and suggestions, and the Commission has considered such responses and, on the date hereof, has made and filed its report setting forth its conclusions and findings and its reasons therefore, which report is hereby referred to and made a part hereof:

It is ordered, That Part 1112 of Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding the following numbered new sections:

§1112.9 Common control.

It shall not be necessary for any person to secure an order of authorization under the foregoing provisions to hold the position of officer or director of two or more carriers, if such carriers are operated under common control or management, either.

(a) Pursuant to approval and authority of the Commission granted under section 5 of the act, or

(b) Pursuant to a controlling, controlled, or common control relationship which has existed between such carriers since before June 16, 1933.

§1112.10 Jointly used terminal properties.

Any person holding the position of officer or director of a carrier is hereby relieved from the foregoing provisions to the extent that he may also hold a directorship and any other position to which he may be elected or appointed with a terminal railroad the properties of which are operated or used by such carrier jointly with other carriers.

(Secs. 12, 17 and 20a, 24 Stat. 383, 40 Stat. 270, and 41 Stat. 494, all as amended; 49 U.S.C. 12, 17 and 20a; 5 U.S.C. 553 and 559)

It is further ordered, That persons holding the position of officer or director of a carrier be, and they are hereby, authorized to hold any directorship or other position to which they may be elected or appointed with more than one carrier, within the scope of section 20 a (12) of the Interstate Commerce Act, when such carriers are lawfully operated under common control or management, or where one or more carriers is a terminal railroad company operated under lawful joint control of two or more carriers;

It is further ordered, That this order shall be effective on the date it is served; and

It is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the office

of the Secretary of the Interstate Commerce Commission, Washington, D.C., and by filing a copy thereof with the Director of the Federal Register.

By the Commission.

[SEAL]

By:

/s/ H. Neil Garson,
Secretary

[F.R. Doc. 70-6098; Filed, May 15, 1970; 8:51 a.m.]

Federal Register, Vol. 35, No. 96
Saturday, May 16, 1970

[151]

CONSUMERS POWER COMPANY

J. W. Kluberg
Vice President and Controller

General Offices: 212 W. Michigan Ave.
Jackson, Michigan 49201
Area Code 517 788-0700

January 21, 1971

Notice of Proposed Rulemaking - Docket R-408
(18 CFR, Parts 3, 32, 33, 34, 35, 36, 45 and 159)

Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Gentlemen:

Att: Mr. Gordon M. Grant,
Secretary

This letter is submitted in response to your Notice of Proposed Rulemaking issued November 25, 1970 in Docket R-408. Correspondence concerning this submission should be addressed to:

Mr. John W. Kluberg
Vice President and Controller
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201
Telephone: 517 - 788-0700

As a preliminary matter, Consumers Power Company notes an apparent error in the language of proposed Regulation Section 36.1(a) wherein there is a reference to deduction of "the amounts reserved pursuant to provisions of Paragraph (c) of this section and Section 36.2 of this part." For the purpose of making its comments, Consumers Power Company has assumed that only Section 36.2 fees would be deducted from the total annual costs of administration. In addition, it is unclear to us as to the effective date for this proposed change in the Commission's regulations. The only reference we can find in the proposed rulemaking to the effective date is in the second

full paragraph on Page 4 where it is indicated that the fee schedules proposed to be adopted have been prepared "to recoup by way of payment into the Treasury of the United States the sums reasonably allocable to the estimated costs in FY 1971 of rendering the types of services performed by the Commission as reflected by costs experienced in FY 1970." Inasmuch as fiscal 1971 is already over half completed, we would recommend that any order issued be effective with fiscal year 1972 beginning July 1, 1971.

[152]

Turning to its substantive comments, Consumers Power Company takes strong exception to the provision of this proposed rulemaking, namely proposed Regulation Section 36.1, which would assess each public utility for such costs of administration of Parts II and III of the Federal Power Act as are not covered by specific fees. The portion of Title V of the Independent Offices Appropriations Act for the year ending June 30, 1952, which was included in the proposed rulemaking, indicated that the federal agency could charge fair and equitable fees for the performance of services which are of value to the recipient. Thus, it would appear that it would be necessary to be able to identify work performed for a specific benefiting person or company. Further, rates developed for that work must be fair and equitable, which implies some relationship between the fee charged and the cost of performing the service. It would appear, therefore, that this would preclude the Commission from charging regulated utilities for the general costs of the Commission which cannot be identified as applying to a specific service for a specific company. If this were not so, it is Consumers Power Company's contention that the provision would permit the Commission to pass on to utility companies not only the normal costs of administration but any additional costs, without limit, that the Commission might choose to incur. The removal of all monetary discipline is not in the public interest.

Even assuming the appropriateness of recovery of total costs from utility companies, the recovery should be made through fees and rates published in advance and applicable to particular filings before the Commission. If utilities are to bear such costs, they should be aware, prior to making a filing, of the extent of their burden. Such a manner of assessing costs of administration might even restrict the number of proceedings filed with the Commission and might thus help to reduce costs.

Finally, Consumers Power Company takes exception to the proposed manner of assessment found in Section 36.1(b), that

> "for each calendar year terminating in such fiscal period the costs of administration determined under paragraph (a) of this section shall be assessed against each public utility in the proportion that the gross revenues of such public utility bear to the sum of the gross revenues of public utilities for the like period."

Consumers Power Company had gross electric revenues in 1969 of almost $308,000,000 and total sales revenue of almost $305,000,000. Over 97% of the sales revenue was obtained from sales at rates prescribed by the Michigan Public Service Commission with another almost 1% obtained from sales to municipalities within the state under separate agreements. Less than 2% of 1969 sales revenues were derived from customers whose rates may be subject to Commission jurisdiction. Under these circumstances, which are expected to continue indefinitely, it seems totally unfair for

[153]

Consumers Power Company to be assessed for costs of administration on the basis of its gross revenues. The proposed assessment bears no reasonable relationship to the costs of the Commission with regard to the Company's particular activities before the Commission.

Accordingly, Consumers Power Company urges that, if the proposed assessment of costs is to be implemented, the assessment be keyed to revenues arising out of jurisdictional sales.

Yours very truly,

By:
/s/ John W. Kluberg

JWK/pb

(156)

[156]

WISCONSIN ELECTRIC POWER COMPANY

231 West Michigan Street
Milwaukee, Wisconsin 53201

January 21, 1971
Docket No. R-408

Federal Power Commission
Washington, D.C. 20426

Gentlemen:

Proposed Revision of Fee Schedules

We do not have any disagreement with the basic intent of the proposed changes revising existing fees and establishing new schedules of fees to be paid by electric and gas companies under Parts II and III of the Federal Power Act and under the Natural Gas Act. We do, however, feel that much more clarification is needed regarding the filing fees, particularly as to how they apply to electric utilities. The sliding percentage scale proposed for major rate increases based on gross revenues would be inequitable. It does not necessarily follow that the expense associated with a particular filing is proportional to the amount of the rate increase requested. For example, is the expense associated with a request for a $500,000 increase five times the expense associated with a $100,000 increase? We feel it would be more appropriate to gear the increase to the complexity of the filing. In addition, the proposed fee schedule apparently is based on the amount of increased revenue requested at the time of filing rather than on the amount of revenue actually granted. Thus, it would appear that the amount of the fee required to be paid may have no relationship with the amount of any rate increase ultimately granted.

Under Section 36.2 Filing Fees, paragraphs (c) and (e) do not specify whether a filing fee is required from each party to the agreement being filed or if only one fee applies and

whether it would be paid by one party or divided among the parties. Another question is whether a filing fee applies to concurrences as well as to the parties actually making filings. The fee seems to be high for minor changes in existing agreements not requiring Commission acceptance, for instance changes in a metering point or cancellation of a rate schedule.

Under Section 36.3 Miscellaneous, it is stated that "No fees will be refunded". This provision appears unfair, particularly if no part of a requested rate increase is granted. Furthermore, there is no provision for settlement of a controversy on the amount of the fee with a possibility that a rate decision could be withheld until the fee controversy is settled. In fact, under Section 34.2, it is prescribed that the

[157]

fee described in Part 36 accompany the application, adding one more requirement to an already complicated filing procedure. It seems unduly harsh that no refund would be permitted if a fee were paid in error or the amount of the fee was incorrectly applied and a lower fee should have been paid.

As I have stated above, we are not disagreeing with the basic purpose of establishing new schedules of fees to be paid by utilities to cover certain costs of the Commission, however, we do feel that the schedule of fees as proposed in this Docket are not only confusing in some respects but are also excessive, especially in respect to minor matters requiring filing and in respect to the percentage scale applied to applications for rate increases.

(157)

We appreciate the opportunity to comment on the proposed revisions of the fee schedules before they are adopted.

Very truly yours,

WISCONSIN ELECTRIC POWER COMPANY

By

/s/ John G. Quale

President

John G. Quale

[163]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Revision of Existing amd Establishment of New Schedules of Fees to be Paid by Ellectric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	)))))))	DOCKET NO. R-408

COMMENTS AND RECOMMENDATIONS OF COLORADO INTERSTATE GAS COMPANY a division of COLORADO INTERSTATE CORPORATION

I. INTRODUCTORY STATEMENT

Colorado Interstate Gias Company, a division of Colorado Interstate Corporation ("CIG"), hereby submits its comments and recommendations concerning the Commission's proposal to revise existing fee schedules and to establish new fee schedules for natural gas companies, as proposed in the Notice of Proposed Rulemaking issued November 25, 1970. GIG is a Class A natural gas company under the jiurisdiction of the Federal Power Commission and therefore is directly affected by the Commission's proposal.

[164]

II. CORRESPONDENCE AND COMMUNICATIONS

Correspondence and communications in regard to this matter should be addressed to:

William H. Cook, Vice President
Colorado Interstate Gas Company, a division of
Colorado Interstate Corporation
Post Office Box 1087
Colorado Springs, Colorado 80901
Phone: (303) 473-2300
and to:
Walter W. Sapp, Vice President & General Counsel
Colorado Interstate Corporation
Post Office Box 1087
Colorado Springs, Colorado 80901
Phone: (303) 473-2300

III.
STATEMENT OF POSITION

CIG does not request a conference at the Federal Power Commission regarding this matter. However, if such conference is scheduled, CIG requests that it be advised.

With respect to the proposed increased fees under Section 159.2 of the Commission's Regulations under the Natural Gas Act, CIG does not object to the proposed level of increased fees provided, and so long as, proper cost studies demonstrate the need for such increased level of fees to approximately offset the costs to the FPC of gas pipeline certificate proceedings. However, CIG does urge that certificates for acquisitions or mergers affecting existing certificated

[165]

pipeline facilities be excluded from application of the provisions of Section 159.2 and that separate and more equitable fee schedules be adopted for such certificate proceedings. The Commission acknowledged in *Northwest Pipeline Corporation*, 41 FPC 418 (1969), "that any future revision [of Section 159.2] should stem from an overall review of the fee schedule and not from peicemeal actions to carve out for separate treatment various classes of certification which arguably involve, on the average, different degrees

of processing cost or recipient value." Docket No. R-408 undeniably constitutes such "an overall review of the fee schedules." Acquisition or merger certifications unquestionably "involve, on the average, different degrees of processing cost or recipient value" as compared to original construction certificates. At the very least the questions of original supply, market and feasibility have previously been determined with respect to existing certificated facilities. Indeed it is difficult to conceive of a situation where the Commission could incur as much expense in a certificate application for construction of the same facilities. Therefore, CIG urges that a separate fee schedule be made applicable to certificate applications for acquisition of pipeline facilities (including mergers) providing for rates that will generate fees more commensurate with costs of such proceedings which CIG submits must be substantially less than costs of applications for construction certificates.

[166]

The Commission's proposed new Section 159.2a would assess costs of administration in excess of the amounts received pursuant to Sections 159.1 and 159.2 (as proposed)[1] against each Class A and Class B natural gas company in the proportion that each company's gas deliveries bears to total gas deliveries of all such companies. CIG submits that language of proposed Section 159.2a is not clear with respect to the time when payments will be due, the period as to which each payment is applicable, nor the period as to which gas deliveries are to be measured. Also proposed paragraph 159.2a (b) reads in part ". . . the costs of administration determined under paragraph (a) of this section shall be assessed . . ." whereas CIG suggests that to accurately reflect the intent of the Commis mission this part should read "the costs of administration *less the amounts received pursuant to the provisions of Sections 159.1 and 159.2 of this Part* as determined under paragraph (a) of this section shall be assesed . . ." (additions underlined).

It is the position of CIG that whatever the proper interpretation of proposed Section 159.2a may be, it is manifestly unfair because:

[1]which excess represents mainly the costs to the Commission of pipeline rate filings as stated in the Notice issued herein

(166)

(a) Companies with higher incidence of rate proceedings creating such balance of costs would benefit at the

[167]

expense of companies with more stable rate structures and lower incidence of rate proceedings;

(b) It imposes an inherent regulatory lag in that the amount of the assessment as proposed can never be ascertained until sometime after the period for which the assessment is applicable. Thus it would not be possible to estimate future assessments which would be an appropriate adjustment in a pipeline company rate case test period; and

(c) It includes nonjurisdictional sales in its allocation formula to the detriment of companies with a larger than average proportion of nonjurisdictional sales with respect to which rate filings are not required.

Rather than allocating such balance of administrative costs (purportedly incurred from rate filings) on the basis of gas deliveries CIG submits that it would be appropriate and fair to all concerned to recover such costs through fees imposed on rate filings. In each case the amount of such fee should represent that per cent of the annual amount of rate increase sought which would cover approximately the cost of the rate proceeding. Thus those companies involved in rate proceedings would pay the costs thereof rather than all companies sharing such costs on a basis unrelated to the generation of such costs. Such a system of fees would eliminate all three objections to the proposed Section 159.2a raised above and would follow the system of fees proposed for rate increase filings under the Federal Power Act.

[168]

With respect to other routine rate filings such as minor tariff changes and service agreements, CIG suggests that a schedule of flat fees be provided to recover costs thereof to the Commission.

If CIG's suggestion of providing fees on rate filings is not acceptable, we suggest that the balance of administrative costs proposed to be allocated on the basis of gas deliveries to be allocated instead on the basis of jurisdictional gas revenues which bear a more direct relationship with rate filings than do total gas deliveries including nonjurisdictional sales. Further, to avoid the regulatory lag problem, the fee should be established in advance so that each company will know what the cost will be in the coming year.

IV.
SUMMARY

In summary, CIG does not object to the increased certificate fees so long as cost studies demonstrate the need for the increased level of fees. CIG does urge that the fees for acquisitions or mergers of existing certificated facilities be revised to more properly reflect the lower costs of such proceedings. Further, CIG believes that the costs of pipeline rate proceedings would be more equitably charged to each company through a fee related to the increase proposed in any rate filing.

Respectfully submitted,
COLORADO INTERSTATE GAS COMPANY
a division of
COLORADO INTERSTATE CORPORATION

By:
/s/ William H. Cook
Vice President

Dated: January 29, 1971

[181]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Service Rendered by the Federal Power Commission	))))))	Docket No. R-408

VIEWS AND COMMENTS OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA

The Independent Natural Gas Association of America (INGAA), pursuant to the Commission's Notice of Proposed Rulemaking herein dated November 25, 1970, submits its views and comments.

I
INTRODUCTION

In tis Notice, the Commission proposes, in connection with its regulation of "natural gas companies" under the Natural Gas Act (Act), (1) to revise upqard existing fees required in connection with pipeline certificate applications, (2) to establish a new annual assessment to be paid by pipelines based on the costs of the Commission's administration of natural gas "pipeline programs", and (3) to establish a further annual assessment to be paid by pipelines based on reserves certificated during the year. INGAA's members are directly affected by the ammendments to

[182]

the Regulations as proposed herein and the comments to follow are submitted on their behalf. INGAA questions seriously the legal propriety of the proposed rule and the manner and extent to which the Commission would impose new fees on gas pipeline companies. Further, the terms of the proposed "assessment"

regulations are unclear, and hence, in the absence of appropriate clarification, will be a source of constant future dispute as to fairness of the application of the regulations to the particular pipeline companies assessed.

II
THE BASIC RATIONALE FOR THE ANNUAL "COST" ASSESSMENT

In its Notice, the Commission states that while its pipeline certificate application fees need slight upqard adjustment for a "self-sustaining" pipeline certificate program, other "pipeline programs", primarily involving rate filings, have not been subjected to a charge. Accordingly, a yearly assessment, based on the amount of natural gas delivered annually, is proposed as means of obtaining revenues to cover such costs. Underlying this approach is the unstated assumption that a pipeline, in submitting rate filings, is seeking a special benefit from the government. Such an assumption is simply contrary to the Natural Gas Act. The basic thrust

[183]

of Section 4 of the Act is to provide just and reasonable rates for the benefit of the general public. The Commission recognized this situation when it first proposed the charging of fees in Docket No. R-282 in 1965. In its Notice of Proposed Rulemaking in that docket dated September 15, 1965, the Commission stated:

> "The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies." (Mimeo, cy. p. 2)

In this respect, the Commission's attention is also directed to Circular No. A-25, issued by the Bureau of the Budget on September 23, 1959 (cited at page 7 of the Commission's Notice in this proceeding), which provides that as a matter of general policy, under the 1952 Appropriation Act, [31 USC 483(a)], "No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public. . . ." Clearly, the "beneficiary" of the Commission's "services" under Section 4 of the Act is not the filing company, but rather, the "general public". Moreover, much of the Commission's activities in processing rate filings is generated by participation by parties other than the applicant. In many instances the time expended by the Commission and the staff is largely

[184]

directed to resolving the issues raised by such participants. To load the costs of the administration of the Natural Gas Act on the pipeline companies, therefore, is, we submit, unfair and unduly discriminatory and contrary to the 1952 Appropriations Act. The cost of securing those services should be paid out of general taxes, and not by an improper taxation, or "assessment" of the regulated companies.

III

THE ANNUAL RESERVES ADDED ASSESSMENT

In its Notice (page 1), the Commission states that it is proposing new schedules of fees which will "be applicable to electric utility companies and *natural gas producers* and pipelines". Thereafter, the Commission states that it is proposing a "fee schedule which will return . . . the costs of the *producer certificate program*" based on annual "new" reserves committed for interstate deliveries. Then, however, for reasons of "administrative convenience", which are not stated, the Commission con-

cludes that certain pipelines[1] should bear all of the cost of the "producer certificate program". This patently and unduly discriminates between pipeline and producer "natural gas companies" without even a suggested factual basis.

[185]

Notwithstanding the "administrative convenience" referred to in the Notice, INGAA believes that the costs of producer regulation should be borne by the producer segment of the industry which generates such costs and not the pipelines. Here again, however, producer regulation is primarily concerned with rates so that the comments heretofore noted with respect to pipeline rate filings are apposite (Also see Notice of Proposed Rulemaking, Docket No. R-282, p. 2).

One further point should be made. Proposed §159.2a(c) would assess pipelines for new reserves certificated during the year covered by the Form 15 report as shown in item 14 of such form. What reserves are included in item 14 is not clear. If, e.g., volumes of gas certificated for sale from one pipeline to another are to be included, there would clearly be a doubling up of the assessment since the supplying pipeline in all likelihood would have previously acquired reserves to support the sale and would pay a fee for the reserves so acquired. The purchasing pipeline (or pipelines) would thus be paying for new reserves certificated which have already been accounted for. This doubling or tripling effect is plainly improper and may well yield revenues in excess of the cost of the producer certificate program.[2] Since no indication has been given of

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[1]The Commission should indicate why it is fair and equitable to require only those pipelines which file Form 15s to bear any and all of the costs of the Commission's "Producer Certificate Program".

[2]In any event the Commission should make clear also that new reserves certificated should not include LNG nor should fees be assessed on the basis of reserves behind any LNG project.

[186]

the nature of these costs, it is impossible for the pipelines really to assess the impact of this proposal. Manifestly, the pipelines should not be required to pay fees on a basis which has no relationship to costs and from which the pipelines derive no direct benefit as contemplated by Circular A-25.

IV
MATTERS REQUIRING CLARIFICATION

Assuming, *arguendo*, the legality of the Commission's proposal, and irrespective of the above informities, the text of the Notice and the terms of the proposed "annual assessment" regulations raise a number of uncertainties which INGAA believes require clarification prior to any further action in this proceeding.

1. In the text of the Notice (page 5), the Commission observes that since the "remaining costs of carrying out the functions of our pipeline programs" [i.e., other than certificate programs] have not been subject to charges, and annual assessment of pipelines should be required to allow for a recovery of such "remaining costs". The difficulty here is that the pipelines have no way of knowing what those "programs" are, what the costs are or what assessment will be made against each company. In these and other respects the instant Notice is woefully lacking. There is no way in which the companies can even begin to appraise the impact on them, either individually or collectively. At the very least the Commission

[187]

should advise the companies not only of the costs to be recovered but the basis for their determination. Assuming the Commission can properly assess pipelines for costs incurred in administering the Act as proposed herein, INGAA urgently requests that this matter be re-noticed and that the Commission spell out in greater detail the basis upon which its costs are to be determined, and the methods it uses or intends to use in allocating costs to "pipe-

line programs". This would provide an opportunity for affected pipelines to review and comment on the development of standards of costing and avoid possible disputes later over shifting of inappropriate costs to the pipelines.

2. The Commission should specify how and when pipelines are to "recoup" the annual "cost" and reserves-added assessment, and provide for the accumulation of carrying charges where appropriate. In this connection, it should be noted that certificate filing fees are capitalized as part of the certificated priject, and interest during construction on such amounts is allowed until the certificated facilities are placed in service.

Further, for each calendar year covered by proposed Section 159.2a the Commission should provide the companies at an early date in the year, well in advance of billing, an estimate of costs and the apportionment of fees thereunder. In this way the pipelines will have an

[188]

opportunity to comment upon the assessment and could at least budget, on an estimated basis, the fees it would incur and could take appropriate action to recover such fees on a reasonably timely basis.

3. In the text of the Notice, the Commission concludes that its "proposal to allocate estimated costs among jurisdictional companies on the basis of their relative amounts of natural gas delivered seems fair and equitable". INGAA does not agree that deliveries of gas provide a "fair and equitable" basis for allocating costs among jurisdictional companies. As indicated previously, INGAA submits there is no basic equity or fairness in the relationship between a particular company's deliveries and the total deliveries of all companies. At best, the ratio merely reflects the company's operations versus the multi-company industry structure for handling deliveries of gas. Thus, any total delivery figure for all Class A and B companies (upon which individual company

proportions may be based)[3] will involve double or tripple counting of the same gas volumes depending on the number of Class A or B companies in the chain from producer to city gate. As such, the individual company's proportionate position is more a matter of accident than equity or fairness.

[189]

4. The rule as proposed, as well as existing Section 159.2, would apply the same fees for acquisitions or mergers affecting existing certificated pipeline facilities as it would to applications for original construction certificates. INGAA urges that certificates for acquisitions or mergers be excluded from application of the provisions of Section 159.2 and that separate and more equitable fee schedules be adopted for such certificate proceedings. The Commission acknowledged in *Northwest Pipeline Corporation*, 41 FPC 418 (1969), "that any future revision [of Section 159.2] should stem from an overall review of the fee schedule and not from peicemeal actions to carve out for separate treatment various classes of certification which arguably involve, on the average, different degrees of processing cost or recipient value" as compared to original construction certificates. At the very least the question of original supply, market and feasibility have previously been determined with respect to existing certificated facilities. Accordingly, a separate fee schedule should be made applicable to certificate applications for acquisition of pipeline facilities (including mergers) providing for rates that will generate fees more commensurate with the costs of such proceedings which INGAA submits will, for the most part, be less than costs of applications for construction certificates.

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[3]In this regard the Commisison should also specify the reasons why it is fair and reasonable to assess Class A and B natural gas companies with costs attributable to Class C and D companies. Certainly, the A and B companies derive no benefit from such activity and to impose the costs upon them would be contrary to Circular No. A-25 as well as the Appropriations Act of 1952.

[190]

CONCLUSION

The proposal of the Commission herein to impose all of the costs of administration of the Natural Gas Act on jurisdictional gas pipeline companies is beyond the directives of Congress relating to user charges. In the last analysis, the general public is the true beneficiary of the regulatory scheme embraced in the Act and the public should share along with the pipelines the costs of administering the Act. INGAA is opposed to the proposed rule, therefore, and urges that it not be adopted by the Commission. Assuming, *arguendo*, the Commission concludes that such costs should be imposed on the industry, we submit that the instant Notice is lacking in the specificity necessary to appraise the industry of the actual costs it would be required to carry, and the manner and methods by which the costs are or are proposed to be derived. Further, INGAA does not believe that the assessment procedures embodied in proposed Section 159.2a are either fair or equitable to the pipelines and they should not be adopted in their present form. INGAA urges the Commission, therefore, to re-notice this matter and to specify more definitively the annual costs it would impose on the pipelines and the methods used and bases for such costs.

INGAA requests that a conference be held and that it and its members be permitted to participate therein.

Communications regarding this matter should be addressed to:

Jerome J. McGrath, Vice President and General Counsel
Independent Natural Gas Association of America
1660 L Street, N.W.
Washington, D.C. 20036

Respectfully submitted,
INDEPENDENT NATURAL GAS
ASSOCIATION OF AMERICA

By
/s/ Jerome J. McGrath
Vice President and General Counsel

Washington, D.C.
February 10, 1971

[193]

TENNESSEE GAS PIPELINE COMPANY
A DIVISION OF TENNECO INC.

P.O. Box 2511, Tennessee Building
Houston, Texas 77001

February 10, 1971

Mr. Kenneth Plumb, Acting Secretary
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Re: Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Service Rendered by the Federal Power Commission, Docket No. R-408

Dear Mr. Plumb:

The Independent Natural Gas Association of America is filing views and comments in response to the Federal Power Commission's proposed rules and regulations in the above matter. Tennessee Gas Pipeline Company, A Division of Tenneco Inc., hereby adopts and endorses INGAA's views and comments.

Please address all communications in this rulemaking proceeding to:

Harry S. Welch, Vice President
Phillip D. Endom, Attorney
Tennessee Gas Transmission Company
P.O. Box 2511
Houston, Texas 77001

(193)

We respectfully request notice of and the opportunity to participate in any conference which may be convened to discuss the proposed rules.

Respectfully submitted,
TENNESSEE GAS PIPELINE COMPANY
A DIVISION OF TENNECO INC.

By
/s/Phillip D. Endom
Attorney

[195]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[18 CFR, Parts 3, 11, 32, 33, 34, 35, 36, 45 and 159]

Before Commissioners: John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr.,
John A. Carver, Jr., and
Albert B. Brooke, Jr.

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	)	Docket No. R-408

ORDER NO. 427

Order amending Part 3 – General Policy and Interpretations, Amending Parts 11, 32, 33, 34, 35 and 45, and adding Part 36 – Regulations Under the Federal Power Act – and Amending Part 159 – Regulations Under the Natural Gas Act

(Issued March 18, 1971)

On November 25, 1970, the Commission issued a Notice of Proposed Rulemaking in this proceeding (35 F.R. 18324, December 2, 1970) proposing to amend its general rules and regulations under the Federal Power Act and the Natural Gas Act to revise the schedules of fees at present imposed in connection with the filing of certain applications by natural gas companies and to establish new schedules of fees and annual charges to be applicable to electric utility companies and natural gas companies.

[2]

Responses were received (exclusive of requests for additional time within which to submit comments[1]) on behalf of 62[2] companies and two industry associations raising questions as to the meaning of certain provisions, suggesting modifications for clarification or on the merits, objecting to the amounts proposed for certain of the services in the noticed schedules of fees and generally questioning the propriety of imposing annual assessments for services rendered in the administration of both Acts or the basis upon which they would be computed. A number of these comments have provided the basis for clarifying this rulemaking and others which have been called to our attention have resulted in revisions incorporating recommendations that will avoid inequities that might otherwise have occurred. The remaining comments and recommendations were considered and those which have been found lacking in merit or not necessary are not discussed in the order herein adopted.

Section 36.1 as proposed clearly stated the Commission's aim that annual assessments covering the balance of the expenses incurred in the administration in each fiscal year of Parts II and III of the Federal Power Act above those recovered by the proposed fees for specified filings be based on gross electric revenues. We proposed that the allocations be based on gross rather than jurisdictional (electric) revenues because of the benefits deriving from our services (both regulatory and involving reliability) since both have direct and substantial impact on the stability

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[1]The notice invited the submission of data, views, comments and suggestions in writing by no later than December 18, 1970; however, by notices issued December 16, 1970 (35 F.R. 19641, December 25, 1970) and January 22, 1971 (36 F.R. 1487, January 30, 1971) the time to do so was extended ultimately to February 5, 1971.

[2]Those responding to the invitation for comments are listed in an appendix attached hereto.

and operations of public utilities regardless of the amount of their revenues derived from jurisdictional sales. However, we recognize

[197]

the jurisdictional sales for resale of many public utilities are relatively small compared to their total revenues and that inequities would result if assessments covering all programs under Parts II and III of the Federal Power Act were based entirely on gross revenues. Accordingly, we have revised this section to provide that the residual costs of administration of our regulatory programs should be allocated on the basis of jurisdictional business but that the costs relating to our coordination and reliability programs which have impact on the total business of the utilities, whether or not jurisdictional, should be allocated on the basis of gross revenues. For the reason above stated, similar revision has been made in Section 159.2a regarding the allocation of assessments among natural gas companies. As revised such companies will be required to pay annual charges covering the residual costs of those programs on the basis of their jurisdictional business whether stemming from sales for resale, transportation of natural gas for others, or both. Other changes in Sections 36.1 and 159.2a have been made for purposes of clarification based on the numerous comments we have received.

We have adopted suggestions that the fees prescribed in connection with the merger or consolidation of facilities be based on a sliding scale instead of a fixed fee. Our design of the fee schedule contemplated a charge of $10,000 for mergers of Class A, Class B utilities or both Class A and B utilities; the mere acquisition of facilities not constituting a merger or consolidation of such utilities, such as the acquisition of a transmission line having a value in excess of $50,000, would have been covered under Section 36.2 (c), as proposed, involving a fee of $500. But this amount would have been payable not only by the applicant disposing of the property but also by the one acquiring it. Instead, we are removing possible ambiguity and providing a more equitable

schedule by requiring payment of a fee, not to exceed $10,000, based on the value of property transferred, as has been proposed. We are also adopting the suggestion that the requisite fee payable upon the filing of applications for the acquisition and disposition of facilities which involve several jurisdictional utilities should be split among them on the theory both the acquiring and disposing utility derive benefit from the transaction. In order to avoid any imposition

[198]

of charges upon non-jurisdictional companies, however, the charges applicable to jurisdictional companies shall be at the rate of ½ percent of the value of facilities acquired and disposed of but not exceeding $5,000 as to each. A non-jurisdictional company acquiring facilities from or disposing of assets to a jurisdictional company will neither be charged nor the costs of such services be borne by the utilities subject to our jurisdiction.

Some filings for rate increases are very small. In such cases a fee of $500 would be inequitable. However, administrative analysis is required regardless of the amount of the increase and it is conceded that a reasonable fee should be imposed for these services. We have accordingly revised proposed Section 36.2 (g) to provide for payment of a flat fee of $100 for increases of less than $5,000, if in sum they constitute no more than one percent of the total charges then in effect with respect to the purchasers affected by such filing. The second requirement is based on our experience that a rate increase though small will necessitate a more thorough evaluation if it constitutes more than a very minor part of the total charges to the customers involved. Where both requirements for the minimum fee are not met, the filing fee will remain at $500 which will also apply to increases from $5,000 to $50,000. Objections to a scaled fee for increases of $50,000 or more are not well taken, since generally our input of services varies directly with the amount of the increases we are required to review. These changes have been made in Section 36.2 (g).

The suggestion that filings for rate increases made under multi-party agreements involving several utilities should be exempt from fee requirements is without merit. The Commission's staff is obligated to evaluate such agreements where filing is required and if they involve rate increases Commission services should not be rendered without charge.

Several responding parties suggested the incorporation of provisions for refunds of various dimensions. The underlying purpose in adopting these fee schedules is to provide for the recoupment to the Treasury for the value of services rendered. Applications which may ultimately be denied in whole or in part after staff review and analysis involve the

[199]

services of the Commission which should be subject to fee charges within the intent of our underlying authority. There is no valid basis for refund in those circumstances. Similarly, the payment of a fee based upon a filing of a rate increase which is ultimately found or conceded to be excessive should not justify a partial refund.

We adopt the suggestion that if an application or filing is withdrawn or rejected as insufficient or for some other reason not involving the input of substantial staff services, the fee should be refunded. If rejection occurs after considerable expenditure of staff time, there is no justification for refund. Accordingly, we have provided for refund in those cases if the filing has been withdrawn or found deficient and rejected. Under our procedures rejection must occur within 30 or 60 days depending on the type of filing; in that time staff effort will not have beem cumulatively large. We have also clarified the status of amended filings in regard to fee requirements and filings for which more than one fee might be payable under these regulations. See Section 36.3.

Two recurrent objections to the proposed regulations require comment. The first, that the Commission does not have authority to charge fees except for and to the extent of the actual cost of specific services rendered has already been considered and was

covered by our discussion in the notice of rulemaking issued in this docket. Congress has by statute vested authority in all agencies of the federal government to prescribe fees or charges for services conferring benefits on persons subject to their jurisdiction so as to render such agencies as fully self-sustaining as possible. The pertinent provision which is included in Title V of the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 USC 483a), reads as follows:

> It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal

[200]

> agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge

or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

[201]

Pursuant to such statute and to recommendations made at hearings before Congressional appropriation committees, we established by order our first schedule of fees (apart from those under Part I of the Federal Power Act) which were payable in connection with applications filed by natural gas pipeline companies for certificates of public convenience and necessity and for other authorizations as especially beneficial to the recipients of the services rendered in their processing. Order 317, 31 F.R. 430, January 13, 1966, as amended by FPC Order 317-A, 31 F.R. 4890, March 24, 1966, Part 159 of the Commission's Regulations Under the Natural Gas Act, 18 CFR, Part 159.

Congressional appropriation committees have since requested further review of our fee schedules with a view to making increases or adjustments to offset in part the increasing needs for direct appropriations for agency operating expenses. S. Rept. No. 1375, 90th Cong., 2d Sess.; H. Rept. No. 1348, 90th Cong., 2d Sess. More recently, the Chairman of the Subcommittee on Independent Offices and Department of Housing and Urban Development of the Committee on Appropriations of the House of Representatives requested us to review our rate and fee structures with a view to charging gas and utility companies enough to sustain our administrative operations. Hearings, Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., Part 2, p. 951.

Moreover, we noted that in developing these schedules we have endeavored to adhere to the guidelines contained in Budget Circular No. A-25 by the imposition of charges "to each identifiable recipient for a measurable unit or amount of Government service . . . from which he derives a special benefit." These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . ." or

(201)

provides "more immediate or substantial gains or values . . . than those which accrue to the general public . . ." or is "performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public . . .".

[202]

Costs directly allocable to a specific type of service rendered to specifically identifiable persons would be effected by charges directly related to that specific service. In determining the amount thereof we are not required to keep cost records on a case-by-case basis but are authorized to average the costs involved in a particular service. *Aeronautical Radio, Inc.* v. *United States*, 335 F.2d 304 (CA7, 1964), certiorari denied, 379 U.S. 966 (1965). Our remaining proposed charges being of benefit overall to the members of both industries would be assessed on a measure of size against those within the ambit of our jurisdictional activities. We deem the allocation formulas we adopt herein to be both reasonable and a practical alternative to the development of a complex, extensive and costly accounting system whereby actual costs involved in each matter would be charged to the parties involved. Even such a system for basing charges would not in all circumstances be equitable since policies developed in prolonged proceedings involving one utility often become applicable to others at a minimum of additional administrative cost. We do not, after considering the content of the responses in this respect, find the comments sufficiently persuasive to require a change in the schedules for annual fees proposed and adopted herein.

We reject the contention that the proposed fees would constitute an illegal imposition of a tax inasmuch as we hold that the proposed charges constitute fees rather than taxes. The distinction between a tax and a fee has been clearly defined by the courts. The cases hold that:

[203]

A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for

public or governmental purposes, and not as payment for a special privilege or a service rendered. *United States* v. *Butler*, 297 U.S. 1, 61 (1936); *Gumby* v. *Yates*, 214 Ga. 17, 102 S.E.2d 548, 550-551 (1958). A fee is a charge fixed by law for services of public officers or for use of a privilege under control of the government. *Fort Smith Gas Co.* v. *Wiseman*, 189 Ark. 675, 74 S.W. 2d 789, 790 (1934). A tax is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society. *Stewart* v. *Verde River Irrigation & Power Dist.* 49 Ariz. 531, 68 P. 2d 329, 334, 335.

While it may possibly be argued that the provision of Title V calling for the payment of the amounts collected in fees into the Treasury as miscellaneous receipts is descriptive of a tax, we believe that an overall reading of Title V firmly supports the contention that the fees are not intended for the support of the government as a whole, but rather as a means of sustaining to the fullest extent feasible those agencies of the government which bestow special privileges and services upon certain individuals who may apply for those privileges and services.

[204]

The question whether the proposed schedules constitute a tax is not affected by the method used in their assessment, i.e., whether in fixed amounts or varying in accordance with specified formulae. The proposed charges were not authorized to impose exactions in the support of government in the general undestanding of the term "tax", *United States* v. *Butler*, 297 U.S. 1, 61; *New Jersey Bell Telephone Co.* v. *State Board of Taxes*, 280 U.S.

338, 347, but would be in the nature of impositions "levied to reimburse the state or a subdivision thereof for services rendered rather than to provide public revenue . . ." 51 Am. Jur., Taxation § 20.[3]

The second objection made by a number of the responding parties is to the amounts projected to be recovered under the proposed fee schedules. In essence, those who have raised this contention state that the benefits of regulation should be borne in part by those who also benefit from the services rendered by the administration of both Acts who are not subject to regulation. These comments have merit. While we do not exercise jurisdiction over REA or municipally operated utilities, they do derive benefits from the services we provide under Parts II and III of the Federal Power Act. In this light it would be inequitable to have the privately owned utilities bear the cost of such services and we have accordingly revised Section 36.1 to reflect this change. (We had already excluded from our formula the costs associated with services rendered to other (including federal) agencies since we have not incorporated in the costs to be assessed our expenses incurred in programs directed to servicing other agencies and the public.)

[205]

However, we do not agree that recoupment of part of the costs of all other services rendered to jurisdictional companies should be absorbed by the taxpayers generally since they primarily benefit the public utilities. The extension of the Commission's jurisdiction in 1935 to public utilities was prompted in substantial

[3]State statutes designed to recover in part the costs of administration of their public servibe commissions either on a fixed-fee basis for specific services or as a percentage of some measure of size or value are not infrequent. See compilation in Committee Print prepared by the Subcommittee on Intergovernmental Relations of the Senate Committee on Operations, dated September 11, 1967 entitled, State Utility Commissions, 90th Cong., 1st Sess., p. 22.

part by the deplorable practices of management which resulted in the collapse of the financial structures upon which the electric utility industry had been erected. The creation of regulatory agencies at the federal[4] level and the exercise of the powers delegated by the Congress to them have provided the foundation for the sound financial condition which public utilities and natural gas companies have achieved.[5] We

[206]

recognize that the exercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or perferential and prejudicial has provided continuing benefit to consumers, but our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their

---

[4]Investigation of both the electric and gas industries by the Federal Trade Commission resulted in the grant of regulatory powers over public utilities. See Title II of the Public Utility Holding Company Act of 1935, 49 Stat. 838. Regulation of natural gas companies, though considered at the time that Act was adopted, was not authorized until 1938. 52 Stat. 821.

[5]A report issued by the Commission in 1950 discussed industry-wide recognition of the benefits accruing from only one facet of the Commission's activities – the adoption of a uniform accounting system. Typical of the comments made was the following in a publication issued by a prominent member of the New York Stock Exchange:

> "A great measure of the improvement in the financial position of the electric utilities has been due to the strengthening of regulatory controls by the Federal Power Commission, and particularly to the enforcement of the new uniform system of accounts.

A trade publication editorialized that

> "At no time in the past twenty years has the electric utility industry of this country been in as sound a position financially as it is today."

Report on the Reclassification and Original Cost of Electric Plant of Public Utilities and Licensees, Federal Power Commission, 1950, pp. 19-20.

ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. In these circumstances we believe that our proposal which would make our operations as self sustaining as reasonably possible is consistent with statutory directives and is equitable, particularly since the charges involved can ultimately be passed on by these companies to their customers as expenses properly includable among items upon which their respective costs of service are based.

The view that the imposition of fees destroys the budgetary restrictions imposed upon agencies like the Federal Power Commission is misplaced since all receipts are payable into the United States Treasury and not available for our use. The Commission's spending power, whether or not such charges are imposed, is predicated on appropriations authorized by the Congress and is dependent solely on the determination of that body as to the funds needed for administration of the powers delegated to us.

These regulations will become effective July 1, 1971. The filing fees will become payable on all applicable filings made after that date and assessments for the costs of administration of the Commission's programs will be made as soon after the close of its fiscal year ending June 30, 1971 as is practicable, except that annual charges relating to the Commission's public utility and natural gas pipeline regulatory programs will be computed and assessed for the first time for the Commission's fiscal year ending June 30, 1972.

[207]

The Commission finds:

(1) That the notice and opportunity to participate in this rulemaking proceeding with respect to the matters presently before this Commission through the submission, in writing, of data, views, comments and suggestions in the manner as described above, are consistent and in accordance with all procedural requirements therefor as prescribed in Section 553 of Title 5 of the United States Code.

(2) That the revisions herein made to the amendments proposed in the notice of rulemaking do not impose a further burden on persons subject to these regulations, do not constitute a substantial departure from the original proposal, and are consistent with the prime purpose of this rulemaking; therefore further notice and opportunity for comment is unnecessary.

(3) Upon consideration of all relevant matters presented, including the arguments, contentions, suggestions and other views expressed in the comments received and having determined that a conference to discuss the proposed amendments was not required, we further find that the amendments to the Commission's regulations adopted herein are necessary and appropriate for carrying out the provisions of the Federal Power Act, the Natural Gas Act, and the Independent Offices Appropriations Act for the Year Ending June 30, 1952.

[208]

The Commission, acting pursuant to the provisions of the Federal Power Act, particularly Section 309 (49 Stat. 858, 16 U.S.C. 825h), the Natural Gas Act, particularly Section 16 (52 Stat. 830, 15 U.S.C. 717o), and the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 U.S.C. 483a), *orders:*

(A) Part 3, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended as follows:

1. The title of Part 3 is amended by inserting the words "Miscellaneous Charges," immediately preceding the words "Ethical Standards". As so amended the title of Part 3 reads as follows:

   PART 3 – ORGANIZATION: OPERATION: INFORMATION AND REQUESTS; MISCELLANEOUS CHARGES; ETHICAL STANDARDS.

2. Sec. 3.102, Public information, requests, and assistance, is amended by revising the section title and by revising paragraph (b) to read as follows:

§ 3.102 Public information, requests, and assistance; miscellaneous charges.

* * * * * * *

[209]

(b) Diring the Commission's regular business hours, the public may examine in the Office of Public Information in Washington, D.C., copies of public information filed with the Commission. Photo copies of public material may be obtained through the public reference room. Fees charged for such copies are established by an annual contract between the Commission and a private company which does the work. Current schedules of fees for copying work are available from the Office of Public Information. Except for requests made by government agencies certification of copies of any official Commission record shall be accompanied by a fee of two dollars. Inquiries and orders may be made to that office personally, by telephone, or by mail.

(B) Subchapter B – Regulations under the Federal Power Act, Chapter I, Title 18 of the Code of Federal Regulations is amended as follows:

1. The title of "Part 11 – Annual Charges" is revised to read as follows:

   PART 11 – ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

2. In "Part 32 – Interconnection of Facilities; Emergencies; Transmission to Foreign Country.", the section titles and introductory clauses of §§ 32.1 and 32.51 and the introductory sentence of § 32.22 are revised to read as follows:

   § 32.1 Contents of application; filing fee.

   Every application under § 202 (b) of the Act shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall set forth the following information:

   * * * * *

[210]

§ 32.22 Application for permanent connection for emergency use; contents; form and style; filing fee; number of copies.

Application for Commission approval of a permanent connection for emergency use only shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall conform with the requirements of §§ 32.1 to 32.4, inclusive, and, in addition, shall state in full the reasons why such permanent connection for emergency use is necessary in the public interest.

§ 32.51 Contents of application; filing fee.

Every application shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall set forth in the order indicated, the following:

* * * * *

3. In "Part 33 – Application for Sale, Lease, or Other Disposition, Merger or Consolidation of Facilities, or for Purchase or Acquisition of Securities of a Public Utility", the title and introductory clause of § 33.2 are revised to read as follows:

§ 33.2 Contents of application; filing fee.

Each such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee prescribed in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which should, insofar as possible, be furnished as to said applicant and each company whose facilities or securities are involved:

* * * * *

[111]

4. In "Part 34 – Application for Authorization of the Issuance of Securities or the Assumption of Liabilities", the title and

introductory clause of § 34.2 are revised to read as follows:

§ 34.2 Contents of application; filing fee.

Every such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee prescribed in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which, in the case of the assumption of a liability, shall be furnished as to both the issuer and the person assuming liability:

* * * * *

5. In "Part 35 – Filing of Rate Schedules", between the heading "Application" and the section title " § 35.1 Application; obligation to file rate schedules", a new " § 35.0 Filing fees", is added which reads as follows:

§ 35.0 Filing fees.

Every filing made under this Part shall be accompanied by the fee described in Part 36 of this Subchapter.

6. Immediately following Part 35, a new "Part 36 – Annual Charges and Fees" is added which reads as follows:

PART 36 – ANNUAL CHARGES AND FEES UNDER PARTS II AND III OF THE FEDERAL POWER ACT

§ 36.1 Annual charges.

Reasonable annual charges shall be assessed by the Commission against each public utility to reimburse the United States for such costs of administration of Parts II and III of the Federal Power Act as hereinafter provided:

[212]

(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's public utility regulatory programs (other than those associated with coordination and reliability) from which shall be deducted the allocable costs associated with services primarily

rendered to or for the benefit of electric systems which are not public utilities as defined in the Federal Power Act and the amounts received during the same period pursuant to the provisions of 36.2 of this Part. The difference shall constitute the adjusted costs of administration of such programs for such period.

(1) The adjusted costs of administration determined under paragraph (a) of this section shall be assessed against each public utility in the proportion that the gross jurisdictional kilowatt hours sold and kilowatt hours delivered under interchange power agreements by such public utility in the calendar year terminating in such fiscal period bear to the sum of the gross jurisdictional kilowatt hours sold and kilowatt hours delivered under interchange power agreements by all public utilities for the like period.

(b) A determination shall be made for each fiscal year of the costs of administration of the Commission's coordination and reliability programs from which shall be deducted the allocable costs associated with services primarily rendered to or for the benefit of electric systems which are not public utilities as defined in the Federal Power Act. The difference shall constitute the adjusted costs of administration of such programs for such period.

(1) The adjusted costs of administration determined under paragraph (b) of this section shall be assessed against each public utility in the proportion that the gross electric revenues of such public utility in the calendar year terminating in such fiscal period bear to the sum of the gross electric revenues of all public utilities for the like period.

(c) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

[213]

§ 36.2 Filing fees.

A filing fee in the amounts set forth below shall accompany each of the following:

(213)

(a) Applications for physical connections $150

(b) Applications for the construction of border facilities $150

(c) Other corporate applications authorized by these regulations under the Federal Power Act $500

The provisions of this paragraph shall not apply to:

(1) applications under Part I of the Federal Power Act which are subject to the fees prescribed in Part 11 of these regulations,

(2) applications for the acquisition by merger or consolidation or the disposition by sale, lease or otherwise of electric facilities which are subject to the fees prescribed in paragraph (d) of this section, and

(3) applications for authority to hold interlocking positions which are subject to the fees prescribed in paragraph (h) of this section.

[214]

(d) Applications by a public utility for the acquisition by merger or consolidation, directly or indirectly, of electric facilities of another person or for disposition by sale, lease or otherwise of electric facilities to another person . ½% of the value of such facilities, but not exceeding $5,000

(1) The fee prescribed by paragraph (d) of this section shall be shared by the public utilities acquiring and disposing of such facilities proportionately to the value of such facilities acquired or disposed of; the entire fee shall be

paid by a public utility acquiring or disposing of such facilities from or to a person not a public utility.

(e) Nominal rate schedule filings voluntarily filed other than those involving rate increases $100

(1) Examples of such filings include schedule changes having minimal impact on the operations of a public utility such as those providing service to an additional delivery point, changes in maximum obligation to serve, changes in minimum billing demand not affecting billings, changes in service rules or regulations not affecting billings, extensions of terms of contracts or continuation of service, cancellation of rate schedules where service is no longer needed, changes in delivery voltages or metering voltages, changes in contract provisions not affecting service,rates or

[215]

billings, and adoption of initial rate schedules containing rates identical to rates applicable to the same customer class previously accepted for filing.

(f) Moderately complex rate schedule filings voluntarily filed $500

(1) Examples of such filings include schedule changes presenting more complex administrative problems such as those involving interconnection agreements, pooling agreements and additional large-scale sales.

(g) Rate schedule filings involving rate increases (computed on an annual basis) in excess of charges for the 12-month period

preceding the proposed effective date thereof, as follows:

(1) Nominal rate increases:

(i) Schedule changes involving increases in rates totalling less than $5,000 and one percent of the total charges to the persons to be affected thereby $100

(ii) Schedule changes involving increases in rates totalling less than $5,000 but not subject to the filing fee provided in subdivision (i) of this subparagraph and those involving increases in rates of $5,000 or more but not less than $50,000 ..... $500

(2) Rate increases other than those covered under subparagraph (1) of this paragraph:

(i) One percent of the amount of such increases up to but not exceeding $1 million;

[216]

(ii) $10,000 plus ½ percent of the amount of such increases in excess of $1 million and not exceeding $10 million;

(iii) $55,000 plus ¼ percent of the amount of such increases in excess of $10 million.

(h) Applications to hold interlocking positions $100

§36.3 Miscellaneous

(a) Annual assessments and fee payments shall be made by check or money order to the Treasurer of the United States. No fees will be refunded unless within sixty days of the filing of an application or rate schedule filing in connection with which such fees have been paid such application or rate schedule filing has been voluntarily withdrawn by the applicant or rejected by the Commission as incomplete or for some other reason.

(b) An application or rate schedule filing submitted for the sole purpose of amending a pending application or rate schedule filing need not be accompanied by a fee in addition to that which accompanied the original submission, provided that if the later application or rate schedule filing would have upon initial filing required payment of a larger fee, such refiling shall be accompanied by an amount equal to the difference between both fees.

[217]

(c) Where an application or filing seeks Commission authorization in the alternative or would otherwise be subject to the payment of more than one filing fee, only the highest fee shall be required.

§36.4 Accounting for fees paid pursuant to this Part.

A public utility subject to the provisions of this Part shall account for the assessments and fees paid by charging the amounts thereof to Account 928, Regulatory commission expenses.

7. In "Part 45 – Application for Authority to Hold Interlocking Positions", the title and introductory clause of §45.8 are revised to read as follows:

§45.8 Contents of application; filing fee.

Each application shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall state the following:

* * * * *

(C) Part 159, Subchapter E – Regulations under the Natural Gas Act, Chapter I, Title 18 of the Code of Federal Regulations is amended as follows:

1. The title of "Part 159 – Fees for Certain Applications Filed Pursuant to the Natural Gas Act" is revised to read as follows:

(217)

PART 159 – FEES AND ANNUAL CHARGES UNDER THE NATURAL GAS ACT

2. In §159.2 Applications involving construction or acquisition of facilities, paragraphs (a), (b) and (d) are revised to read as follows:

§159.2 Applications involving construction or acquisition of facilities.

* * * * *

[218]

(a) Within 30 days following issuance of notice of application, an amount equal to 65/1000 of 1 percent (0.00065) of the estimated cost of construction of new facilities or of facilities to be acquired;

(b) Within 30 days following grant of the certificate, an amount equal to 130/1000 of 1 percent (0.00130) of the estimated cost of construction of new facilities or of facilities to be acquired, unless applicant does not accept the certificate.

* * * * *

(d) If the actual cost of construction of new facilities or of facilities to be acquired exceeds the estimated cost thereof, the statement of actual cost, required to be submitted by § 157.20(c)(4) and (d)(3) of this chapter, shall be accompanied by an amount equal to 195/1000 of 1 percent (0.00195) of the excess of actual cost (plus estimated cost of facilities for which actual cost is not then recorded on the books of applicant) above estimated cost.

* * * * *

3. Immediately following § 159.2, a new "§ 159.2a Annual charges" is inserted which reads as follows:

§159.2a Annual charges.

Reasonable annual charges will be assessed by the Commission against natural gas companies to reimburse the United States for costs of administration of the Natural Gas Act, as hereinafter provided:

[219]

(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's natural gas pipeline programs from which shall be deducted the amounts received during the same period pursuant to the provisions of §§ 159.1 and 159.2 of this Part. The difference shall constitute the adjusted costs of administration of such programs for such period.

(1) The adjusted costs of administration determined under paragraph (a) of this section shall be assessed against each Class A and Class B natural gas company in the proportion that the total jurisdictional gas deliveries of such natural gas company in the calendar year terminating in such fiscal period bear to the sum of the jurisdictional gas deliveries of all Class A and Class B natural gas companies for the like period.

(b) In addition to the annual charges prescribed by paragraph (a) of this section, each natural gas company required to file an Annual Report – Total Gas Supply on FPC Form No. 15 shall be assessed one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form.

(c) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

[220]

4. In " §159.3 Miscellaneous", paragraph (a) is revised to read as follows:

§159.3 Miscellaneous.

(a) Method of payment. Annual assessments and fee payments shall be made by check or money order payable to the Treasurer of the United States. No fees will be refunded.

(D) The amendments herein adopted shall become effective July 1, 1971, except that annual assessments required to be paid under § 36.1(a) and § 159.2a (a) of these regulations shall first be assessed for the calendar year terminating in the fiscal year of the Commission ending June 30, 1972.

(E) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(SEAL)

Commissioner Carver concurring in part and dissenting in part filed a separate statement appended hereto.

Kenneth F. Plumb,
Acting Secretary.

[221]

Docket No. R-408 **APPENDIX**

The following companies and industry associations filed responses to the invitation contained in the Notice of Rulemaking in Docket No. R-408 (apart from those requesting additional time in which to do so):

Alabama Power Company
Algonquin Gas Transmission Company
Allegheny Power Service Corporation on behalf of seven public utilities
American Electric Power Service Corporation on behalf of seven public utilities
Arizona Public Service Company
Arkansas Power & Light Company
Carolina Power & Light Company
The Cincinnatti Gas & Electric Company
Colorado Interstate Gas Company
Columbia Gas System Service Corporation
Consumers Power Company
The Dayton Power and Light Company
Delmarva Power & Light Company of Maryland
Delmarva Power & Light Company of Virginia
Duquesne Light Company
Edison Electric Institute
Florida Power Corporation
Georgia Power Company
Gulf Power Company
Idaho Power Company
Illinois Power Company
Independent Natural Gas Association of America
Iowa-Illinois Gas and Electric Company
Iowa Southern Utilities Company
The Kansas Power and Light Company
Kentucky Utilities Company
Louisiana Power & Light Company
Michigan Gas Storage Company
Minnesota Power & Light Company

Mississippi Power Company
The Montana Power Company
Natural Gas Pipeline Company of America
New England Power Service Company on behalf of four public utilities
New Orleans Public Service Inc.

[222]

Otter Trail Power Company
Pacific Gas and Electric Company
Pacific Power & Light Company
Pennsylvania Power & Light Company
Philadelphia Electric Company
Phillips Petroleum Company
Public Service Electric and Gas Company
Puget Sound Power & Light Company
Southern California Edison Company
Texas Gas Transmission Corporation
United Natural Gas Company
Utah Power & Light Company
Washington Gas Light Company
Wisconsin Electric Power Company
Wisconsin Power & Light Company

[223]

Docket No. R-408

CARVER, Commissioner, *concurring* in part and *dissenting* in part:
(Issued March 18, 1971)

I agree that sound public policy as well as the specific requirements of the Independent Offices Appropriation Act, 1952 dictate that the use of public resources and facilities and the receipt of certain services and functions of the government be supported by user fees or charges assessed against those benefited. The order promulgated herein is therefore well founded, required by law and the rates established bear a reasonable relationship to the cost of the services involved, and I join in approving it, except as to that portion of it which adds Part 36, relating to Annual Charges and Fees under Parts II and III of the Federal Power Act.[1] I cannot concur in that part of the order, and the reasons for my dissent are stated briefly below.

As a basic philosophical premise, I do not believe that general governmental functions, unrelated to special services or privileges extended by the sovereign, should be made self-sustaining through levies upon particular persons or industries. Regulation in the public interest is conducted for the benefit of the general public; it ought to be financed out of the general fund of the Treasury in the same manner as other governmental functions.

It is a fiction that this part of the fee structure falls upon the regulated companies. All regulatory costs are always includible in

[1] I recognize that some part of the schedule of fees applicable to natural gas companies is subject to the objections specified to inclusion of Part 36. I have chosen not to try to differentiate the acceptable from the unacceptable, as not necessary for the objectives of this dissent.

the cost of service, so that the incidence of these fees will fall upon the ratepayers. Although consumers of utility services are broadly representative of the total taxpaying public, it is notorious that utility rates are more favorably disposed toward the larger consumer. Thus, a heavier proportion of the fee burden will attach to those least able to pay. It is, in effect, a regressive impost which is contrary to the general tax philosophy at the Federal level.

[224]

To the extent that Part 36, added to our regulations by this order, attempts to recover administrative costs above and beyond those that have direct relation to a service rendered or privilege enjoyed (such as an annual charge on some *ad valorem* basis), it ceases to qualify as an authorized regulation establishing a fee structure. It is based on revenue requirements, rather than costs incurred or value received, and as such is more accurately defined as levying a tax. I find nothing in either the Federal Power Act or the Natural Gas Act, nor in Title V, Independent Offices Appropriation Act, 1952, which permits or requires us to levy and collect taxes.

The levy of an annual fee as a revenue measure is objectionable as bad public policy and is not legally sound.

/s/ John A. Carver, Jr.
Commissioner

[225]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Revision of Existing and	)	
Establishment of New Schedules	)	
of Fees to be Paid by Electric	)	
Public Utility Companies and	)	Docket No. R-408
Natural Gas Companies and for	)	
Miscellaneous Services Rendered	)	
by the Federal Power Commission	)	

APPLICATION FOR REHEARING
OF THE
EDISON ELECTRIC INSTITUTE

The Edison Electric Institute (Institute), the trade organization of the investor-owned electric public utility industry, hereby petitions under Section 313(a) of the Federal Power Act and Section 1.34 of the Commission's Rules of Practice and Procedure for rehearing of the Commission's Order No. 427 issued March 18, 1971 in the above entitled proceeding.

In response to the Commission's Notice of Proposed Rulemaking in this proceeding, the Institute filed comments in which it opposed a number of the proposed changes. the Institute also pointed out that there were a number of ambiguities as well as inequities in the proposals. Accordingly the Institute requested a conference to discuss the proposed rulemaking in which it as well as others could point out in greater detail the infirmities of the proposal.

[226]

Specifically such a conference could include discussion of the following issues:

1. Which of the Commission's activities under Part II and Part III of the Act are primarily for the benefit of the regulated utilities and which are primarily for the benefit of the general public?

2. Does proposed Section 36.2 include all of the activities of the Commission under Part II and Part III of the Act which are primarily for the benefit of the regulated utilities and exclude all that are primarily for the benefit of the general public?

3. Is there any way, under the Act and Title V, to prescribe fees to cover all or any part of the cost of Commission activities under Part II and Part III of the Act which are not primarily for the benefit of the regulated utilities?

4. Are the fees set forth in proposed Section 36.2 reasonably related to the costs to the Commission of performing the activities to which they relate?

Instead of granting the request for conference the Commission issued Order No. 427 without giving the Institute the chance fully to present its views. If the Institute had anticipated that its request for a conference would not have been granted it would have filed more comprehensive comments.

WHEREFORE the Institute requests that this application for rehearing be granted, that a conference be held in which all interested parties would be invited to participate, and after such conference the Commission issue a new order in

this proceeding which will reflect the views expressed at the conference.

Respectfully submitted,
Edison Electric Institute

By
/s/ Peyton G. Bowman, III
Its Attorney

William H. Coldiron, Esq.
Montana Power Company
40 East Broadway
Butte, Montana 59701

Reid & Priest
1701 K Street, N.W.
Washington, D.C. 20006

April 13, 1971

DISTRICT OF COLUMBIA) SS:

PEYTON G. BOWMAN, III, being first duly sworn, deposes and says that he is attorney for The Edison Electric Institute; that he has been duly authorized to execute, verify and file with the Federal Power Commission the foregoing document; that he has read the contents of same and that the statements contained therein are true and correct to his best information, knowledge and belief.

By
/s/ Peyton G. Bowman, III

Subscribed and sworn to before
me this 13th day of
April, 1971.

/s/Lee S. Sherline
Notary Public

My commission expires Nov. 14, 1973.

[229]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of §1.17 of the Rules of Practice and Procedures.

Dated at Washington, D.C. this 14th day of April, 1971.

By
/s/Peyton G. Bowman, III

Of Counsel For
Edison Electric Institute

[230]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Service Rendered by the Federal Power Commission	)))))	Docket No. R-408

APPLICATION OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA FOR REHEARING

Comes now Independent Natural Gas Association of America (INGAA) and, pursuant to Section 19(a) of the Natural Gas Act (15 USC 717r(a))(Act) and Section 1.34 of the Regulations under the Act, submits its Application for Rehearing of Order No. 427, issued herein on March 18, 1971.

The person upon whom service of pleadings, documents or communications with respect to this matter should be made is:

Jerome J. McGrath, Vice President and General Counsel
Independent Natural Gas Association of America
1660 L Street, N. W.
Washington, D. C. 20036

I

INGAA is a non-profit national trade association representing virtually all of the major long distance natural gas transmission

lines in the United States, all of which are subject to the jurisdiction of the Commission under the Act. Most, if not all of these companies are directly affected by the

[231]

Commission's Order No. 427 herein. Its membership also includes producers and distributors of natural gas.

II

In Order No. 427 the Commission has revised upward existing fees required in connection with pipeline certificate applications (§ 159.2) and has established new annual assessments to be paid by pipelines based on the cost of the Commission's administration of natural gas pipeline programs, after deducting fees received pursuant to §§ 159.1 and 159.2, and new fees based on gas reserves certificated to individual pipelines during the year as shown by FPC Form 15 for each company for the particular year to which the fee is related.

In its comments filed herein on February 10, 1971, INGAA challenged the legal propriety of the rule and the proposal of the Commission to load practically all of the costs of administration of the Natural Gas Act on pipeline companies. Such comments spelled out in detail the basis of INGAA's position and the infirmities, both legal and practical, infecting the Commission's proposal. Order No. 427, however, ignores and disregards completely INGAA's objections. INGAA submits, further, that Order No. 427 is arbitrary and capricious and beyond the authority given the Commission under the Act or any other statutory directive.

[232]

III

It is INGAA's position that the Commission has no authority to require pipelines to pay the costs generally incurred by the Commission in its administration of the Natural Gas Act. In the

first place, the new fee assessments, apart from the increase in certificate filing fees, are unrelated to any special services or privileges extended to the pipeline companies by the Federal Government, i.e., the FPC. The general administrative functions carried out under the Natural Gas Act are conducted for the general public and, as Commissioner Carver noted in his dissent, ought to be financed out of the general fund of the Treasury in the same manner as other governmental functions. Secondly, as Commissioner Carver also noted, it seems apparent that the Commission is levying a tax against the pipeline companies as a revenue measure and not on the basis of costs directly related to a service rendered or privilege enjoyed.

IV

Underlying the Commission's order insofar as it related to "pipeline programs" is the assumption that a pipeline, in submitting rate filings, is seeking a special benefit from the government. Such as assumption is simply contrary to fact and to the fundamental objectives of the Act. As INGAA pointed out in its comments, the basic thrust of Section 4 of the Act is to provide just and reasonable rates for the benefit of the general public. The Commission recognized this to be the case when it first proposed the

[233]

charging of fees in Docket No. R-282 in 1965. In its Notice of Proposed Rulemaking in that docket dated September 15, 1965, the Commission stated:

> "The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies." (Mimeo, cy. p.2)

Moreover, Circular No. A-25, issued by the Bureau of the Budget on September 23, 1959, and upon which the Commission in part relies, provides that as a matter of general policy "No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public. . . . .". Clearly, the "beneficiary" of the Commission's "services" under Section 4 of the Act is not the filing company, but rather, the "general public". In point of fact, much of the Commission's activities in processing rate filings is generated by participation by parties other than the applicant. In many instances the time expended by the Commission and the staff is largely directed to resolving the issues raised by such participants. To load the costs of the administration of the Natural Gas Act on the pipeline companies, as Order No. 427 would do, INGAA submits, is inequitable, unfair and unduly discriminatory and contrary to the 1952 Appropriations Act and Circular A-25. The cost of securing those services should be paid

[234]

out of general taxes, and not by an improper taxation, or "assessment" of the regulated companies.

V

Further, assessing pipelines for the cost of producer regulation patently and unduly discriminates between pipeline and producer and is otherwise unlawful. The sole basis of the Commission's action, as indicated by the Notice, is "administrative convenience". There is, however, no legal justification for such action. The law is clear that fees are to be assessed against "identifiable recipients" of special benefits. Circular A-25 specifically provides that

> "3. *General policy.* A reasonable charge, . . . should be made to *each identifiable recipient* for a measurable unit or amount of Government service or property

from which he derives a special benefit." (emphasis supplied)

The costs of producer regulation, INGAA submits, should be borne by the producer segment of the industry which generates such costs and not the pipelines. The Commission thus erred in loading such costs on the pipeline companies who benefit only indirectly from producer regulation.

VI

Assuming, arguendo, the validity of the Commission's action here, the pipelines have no way of knowing what the "programs" are for which they are to be assessed, what the costs are or what proportionate assessment will be made against each company. There is no way a company can even begin to appraise the impact on it or to determine how much money

[235]

it will have to pay annually to the Commission. At the very least the Commission should advise the companies not only of the cost to be recovered but the basis for their determination and make provision for a tracking procedure by which the companies can file timely protective rate increases to cover such costs. Order No. 427 is silent in this regard. INGAA urges, therefore, that Order No. 427 be modified so as to specifically permit the filing of tracking increases by pipelines to enable the companies to recover, over the next ensuing twelve months, the costs assessed against them.

VII

INGAA does not agree that deliveries of gas provide a "fair and equitable" basis for allocating costs among jurisdictional companies. As noted in the comments filed previously herein, there is no basic equity or fairness in the relationship between a particular company's deliveries and the total deliveries of all companies. At best, the ratio merely reflects the company's

operations versus the multi-company industry structure for handling deliveries of gas. Thus, any total delivery figure for all Class A and B companies (upon which individual company proportions may be based) will involve double or triple counting of the same gas volumes depending on the number of Class A or B companies in the chain from producer to city gate. As such, the individual company's proportionate position is more a matter of accident than equity or fairness. All of which

[236]

points up again the basic inequity of the Commission's Order.

CONCLUSION

The Order of the Commission imposing all of the costs of administration of the Natural Gas Act on jurisdictional gas pipeline companies is beyond the directives of Congress relating to user charges and is arbitrary and capricious. The general public is the true beneficiary of the regulatory scheme embraced in the Act and the public should share along with the pipelines the costs of administering the Act. INGAA urges the Commission to grant rehearing and, upon rehearing vacate Order No. 427 insofar as it would impose annual assessments on pipelines for costs incurred in the overall administration of the Natural Gas Act and the costs related to producer regulation. Further, and in any event, Order No. 427 should be modified so as to provide for tracking procedures so that pipelines may track fees imposed on such companies on a timely basis.

Respectfully submitted,
INDEPENDENT NATURAL GAS
ASSOCIATION OF AMERICA
/s/ By Jerome J. McGrath
Vice President and
General Counsel

Washington, D. C.
April 16, 1971

(237)

[237]

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

Jerome J. McGrath, being first duly sworn according to law, says that he is Vice President and General Counsel of Independent Natural Gas Association of America; that he has read the foregoing Application for Rehearing and is familiar with the contents thereof; and that he has executed same on behalf of said Association with full power and authority to do so.

/s/ Jerome J. McGrath
Jerome J. McGrath

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 16th day of April, 1971.

/s/ Etha T. Connor
Notary Public

My Commission Expires August 14, 1974

[238]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	)))))	Docket No. R-408

APPLICATION FOR REHEARING AND RECONSIDERATION

COMES NOW the Southern California Edison Company and respectfully applies to the Commission for a rehearing and reconsideration of its Order No. 427 issued March 18, 1971, in Docket No. R-408. Such application is based upon the grounds that the modifications made in such order to the rules originally proposed by the Commission in its notice of proposed rulemaking dated November 25, 1970, do not cure all the legal errors in the action taken by the Commission. Order No. 427 of the Commission is defective in a number of respects, including the following:

1. The order exceeds the jurisdiction of the Commission.

2. It is neither lawful nor appropriate for the Commission to attempt to allocate among all the utilities it regulates its residual costs of administration of Part II and

[239]

Part III of the Federal Power Act.

3. As indicated in the dissenting portions of the opinion of Commissioner Carver, the portions of Order No. 427 that attempt to recover administrative costs above and beyond those that have direct relation to a service rendered or a privilege enjoyed do not properly qualify as fees, but are rather in the nature of taxes which the Commission cannot properly levy and collect. In this connection, the Commission, in its Order No. 427, purports to rely upon case law, indicating that "a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society"; it may be fairly stated that insofar as the regulated utilities are concerned, Parts II and III of the Federal Power Act are about as voluntary as participating in the federal income tax.

4. Order No. 427 is unlawfully discriminatory.

a. No distinction is drawn between utilities whose security issues require Federal Power Commission authorization under Part II of the Act and those whose do not.

b. The order would have an effect similar to adding an additional tax at the federal level on

[240]

investor-owned utilities based upon revenues having no demonstrable relationship to the services alleged to be rendered, and could conceivably tend to erode both the personnel and efficiency factors in the carrying on of the functions of the Commission and the budgetary controls of the Congress over such operations.

5. The order was issued by the Commission in a manner which is contrary to the fundamental concepts of due process of law, and is arbitrary and unreasonable.

a. The notice of proposed rulemaking, while indicating that the Commission had "thoroughly reviewed the existing fee structure and the areas of our administrative operations which have not heretofore been subject to any charges" and that the manner in which allocations whould be made with respect to the Commission's functions under Parts II and III of the Federal Power Act had "been the subject of much study" and indicating that the Commission believed that its proposals "not only spread those costs fairly and equitably but that they are consistent with the legislative and executive mandates we are required to carry out", there was nothing in the notice to indicate

[241]

in any way what was in the Commission's study to motivate such belief or to support such conclusion. The notice did contain an invitation to persons filing comments to request a conference at the Federal Power Commission to discuss the proposed amendments. Requests for such a conference

were filed by a number of persons, including the applicant herein. (See letter dated December 15, 1970, to the Commission from Southern California Edison Company.) No such conference was ever set, but instead Order No. 427 was peremptorily issued on March 18, 1971, despite the fact that applicant is informed and believes and, based upon such information and belief, alleges that representatives of the Commission that a conference would be held upon such requests.

b. While recognizing that jurisdictional sales for resale by many public utilities are relatively small compared to their total revenues and that inequities would result if assessments covering all programs under Parts II and III of the Federal Power Act were based entirely on gross revenues as previously proposed, the Commission has revised its rule

[242]

but, in so doing, has asserted that costs will be allocated to coordination and reliability on the basis of gross revenues. There is no indication in the order as to how the allocation of costs between their "residual" regulatory actions and their actions involving coordination and reliability are to be segregated or determined.

c. There is no finding or determination in the order indicating the alleged benefits bestowed upon the utilities by Parts II and III are not shared by other members of society.

6. The undersigned does not subscribe to the view that the present financial condition which public utilities and natural gas companies have achieved is attributable to the "benefits" (both positive and negative) provided them by Parts II and III of the Federal Power Act primarily benefit the public utilities, and would seriously question that there was substantial evidence to support any such determinations.

7. The order unlawfully and unconstitutionally denies investor-owned public utilities and their customers, respectively, equal protection of the laws and deprives them of property without due process of law in violation of Article V of the United States Constitution (see *Bolling v. Sharpe*, (1953) 347 U.S. 497, 74 S. Ct. 693; and *Todd v. Joint Apprenticeship Committee*,

[243]

(1963) 223 Fed. Supp. 12, 19).

For these reasons, it is respectfully requested that the Commission reconsider its Order No. 427, grant a rehearing, schedule a conference at which full and fair discussion of the proposed amendments may be had, and prior thereto, as heretofore requested by applicant, furnish the participants with a copy of the study referred to in the Commission's notice upon which the Commission bases its belief that its proposals spread the costs fairly and equitably and consistent with the legislative and executive mandates.

The name, title and mailing address of the person to whom communications concerning this application should be sent is as follows:

Rollin E. Woodbury
Vice President and General Counsel
Southern California Edison Company
Post Office Box 351
Los Angeles, California 90053.

Respectfully submitted,

SOUTHERN CALIFORNIA EDISON COMPANY

/s/ By Rollin E. Woodbury

Vice President and General Counsel

[244]

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

ROLLIN E. WOODBURY, being first duly sworn, on oath, says that he is Vice President and General Counsel of Southern California Edison Company; that he has read the foregoing Application for Rehearing and Reconsideration of Commission's Order No. 427, and that he is familiar with the contents thereof; that, as such officer, he has executed the same for and on behalf of said Company with full power and authority to do so; and that the matters and facts set forth therein are true to the best of his information, knowledge and belief.

/s/ Rollin E. Woodbury

Subscribed and sworn to before me
this 14th day of April, 1971.

/s/ Dona Mary Wilcomb
Dona Mary Wilcomb
Notary Public in and for said County and State
My Commission expires June 27, 1973.

[245]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure.

Dated at Los Angeles, California, this 14th day of April, 1971.

(245)

/s/ Rollin E. Woodbury

ROLLIN E. WOODBURY

Of counsel for
Southern California Edison Company

[246]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matter of	)	
	)	
Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and for Miscellaneous Services Rendered by the Federal Power Commission	)	Docket No. R-408

APPLICATION FOR REHEARING
OF TENNESSEE GAS PIPELINE COMPANY,
A DIVISION OF TENNECO INC.

Tennessee Gas Pipeline Company, a Division of Tenneco, Inc. (Tennessee), being aggrieved by the Federal Power Commission's Order No. 427 in the above proceeding, hereby applies for rehearing pursuant to Section 19 (a) of the Natural Gas Act.

I.

The Independent Natural Gas Association of America (INGAA), in response to the Notice of Proposed Rulemaking in this proceeding, filed views and comments with the Commission pointing out, *inter alia*, that the proposed annual charges to be assessed against pipelines were contrary to the policies of the Natural Gas Act and the provisions of the 1952 Appropriations Act.

INGAA further showed that the terms of the proposed annual assessment regulations posed such basic uncertainties and left so many questions unanswered that it was virtually impossible to meaningfully comment in response to the notice. Accordingly, *inter alia,* INGAA requested the Commission to re-notice the proposed rulemaking setting forth on a definitive basis the costs and the method of deriving

[247]

the costs which each year the natural gas pipeline industry would be required to meet by payment of annual "cost" and "reserve-added" assessments. INGAA further argued that the proposed annual assessments were in many respects discriminatory, unfair and inequitable. Tennessee expressly adopted and endorsed INGAA's comments by letter to the Commission dated February 10, 1971. By this application for rehearing, Tennessee hereby re-asserts all the points raised by INGAA's comments as above indicated and incorporated by reference those comments, *mutatis mutandis,* as a part of this application for rehearing of Order No. 427.

II

In addition, however, Tennessee objects to Order No. 427 on grounds that it is unfair and inequitable to, and unlawfully discriminates against, pipelines, such as Tennessee, with a high percentage of "jurisdictional gas deliveries." By order No. 427, the Commission, without prior notice, specified that the annual cost of pipeline regulation (less certificate application fees) shall be allocated on the basis of "jurisdictional gas deliveries" of each pipeline, as originally proposed. The effect, of course, is to shift a further portion of the cost of pipeline regulation to those pipelines with a high percentage of jurisdictional deliveries, and away from pipelines with

significant direct sale loads.[1] There is

[248]

no rational or factual basis for the change in method of allocation from that originally proposed, other than some imagined need for symmetry in the treatment of pipelines and electric utilities. Plainly, the operations and structures of electric utilities for jurisdictional purposes provide no basis for relieving those gas pipelines with significant direct sale loads or which transport substantial quantities of gas for others and technically might not make "jurisdictional deliveries" of such gas, from sharing proportionately in the reimbursement of the Commission for the cost of regulation. Indeed, some of the Commission's most significant problems relate to direct sales by pipelines and to the transportation of gas where no "jurisdictional deliveries" may actually be made.

III

Tennessee further objects to the rule because there is no rational connection between the various Commission "findings" (e.g., pp. 11 and 12) and the ultimate conclusion that natural gas pipeline companies should bear the cost of pipeline and producer regulation under the Natural Gas Act. Moreover, there was no evidence to support the "findings" which were made.

WHEREFORE, for all the foregoing reasons, Tennessee respectfully submits that the Commission should grant rehearing and upon rehearing set aside its Order No. 427 insofar as that order establishes annual assessments to be paid by natural gas pipelines.

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[1] While such deliveries may be non-jurisdictional, the Commission nevertheless must consider such sales when fixing the pipelines' rates and in passing on applications for certificate authority to construct and operate facilities for use in making such sales.

Respectfully submitted,

TENNESSEE GAS PIPELINE COMPANY
A DIVISION OF TENNECO INC.

Harry S. Welch
Philip Endom
P.O. Box 2511
Houston, Texas
77001

/s/ By Harold L. Talisman

Harold L. Talisman
Littman and Werner
1001 Connecticut Ave., N.W.
Washington, D. C. 20036

Of Counsel

April 16, 1971

Its Attorney

[249]

District of Columbia : ss

Harold L. Talisman, being first duly sworn according to law, says that he is an attorney for Tennessee Gas Pipeline Company, a Division of Tenneco Inc; that he has read the foregoing Application for Rehearing of said company, and is familiar with the contents thereof; that he has executed the same for and on behalf of said Tennessee Gas Pipeline Company, a Division of Tenneco Inc., with full power and authority so to do; and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ Harold L. Talisman

Harold L. Talisman

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 16th day of April, 1971.

My Commission Expires:
February 28, 1975

/s/ Louise H. Parmer

Louise H. Parmer
Notary Public

(249)

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of § 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D.C., this 16th day of April, 1971.

/s/ Harold L. Talisman

Harold L. Talisman

Of Counsel for
Tennessee Gas Pipeline Company,
a Division of Tenneco Inc.

[250]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and and for Miscellaneous Services Rendered by the Federal Power Commission	(	Docket No. R-408

PETITION BY
THE MONTANA POWER COMPANY
FOR REHEARING

In response to the notice of proposed rulemaking in the above Docket, The Montana Power Company submitted Comments to the Commission on January 20, 1971 and requested a conference at the Federal Power Commission with regard to such Comments and the Comments filed by other parties. No such conference was scheduled by the Commission.

On March 18, 1971 the Commission issued its Order No. 427 in the above Docket amending certain of its rules and adding to those rules Part 36 establishing Annual Charges and Fees under Parts II and III of the Federal Power Act.

Petitioner still believes that a conference at the Federal Power Commission among parties who will be adversely affected by the amended and new rules and regulations prescribed in said Order No. 427 would be useful and beneficial.

WHEREFORE, Petitioner, pursuant to Section 3.13 (a) of the Federal Power Act, applies for a rehearing on Order No. 427 in Docket No. R-408 on the following grounds:

(1) Order No. 427 imposes burdensome fees and charges upon

public utilities and licensees subject to the jurisdiction of the Commission.

[251]

(2) Said Order No. 427 imposes burdensome fees and charges based upon utility revenues which are not subject to the jurisdiction of the Federal Power Commission.

(3) The fees and charges proposed to be imposed by the Commission's Order No. 427 will be expenses which must be borne by customers of Petitioner and other utilities for services not subject to the Commission's jurisdiction.

(4) No hearing was afforded Petitioner and other parties similarly situated.

Respectfully submitted this 14th day of April, 1971.

THE MONTANA POWER COMPANY

/s/ By William H. Colderon

Vice President

[252]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Revision of Existing and Establish ment of New Schedules of Fees to be Paid by Electric Public Utility Companies and for Miscellaneous Services Rendered by the Federal Power Commission	))))))	Docket No. R-408

APPLICATION FOR REHEARING
SUBMITTED BY NEW ENGLAND POWER COMPANY

Name and address of representative for service:

Richard B. Dunn, General Counsel
New England Power Company
20 Turnpike Road
Westborough, Massachusetts 01581

[253]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and for Miscellaneous Services Rendered by the Federal Power Commission	)	Docket No. R-408

APPLICATION FOR REHEARING
SUBMITTED BY NEW ENGLAND POWER COMPANY

On March 18, 1970 the Federal Power Commission issued Order No. 427 revising existing and establishing new schedules of filing fees to be paid by jurisdictional companies and establishing formulae for charging jurisdictional companies for the remaining costs of administration other than in connection with certain services primarily rendered for non-jurisdictional entities.

Pursuant to Section 313(a) of the Federal Power Act and Section 1.34(a) of the Commission's Rules of Practice and Procedure, New England Power Company (the "company") respectfully applies for rehearing of Order No. 427, upon the grounds set forth hereinafter, and requests (1) an evidentiary hearing of the factual issues susceptible of

[254]

proof and (2) an opportunity to file a brief in response to the new legal and policy considerations resulting from the issuance of said Order No. 427.

The Company is an interstate wholesale generation and transmission company and is the wholesale supplier of substantially all the electric energy requirements of its affiliates, Massachusetts

Electric Company, The Narragansett Electric Company and Granite State Electric Company, all of said companies and the Company being subsidiaries of New England Electric System, a registered holding company under the Public Utility Holding Company Act of 1935.

I

The method of allocation of annual charges among the respective public utilities as set forth in new Section 36.1 fails to meet the fair and equitable standard set forth in 31 USC 483a, 65 Stat. 290, for a variety of reasons including:

1. As compared to an independent public utility, it unfairly penalizes a public utility that is a member of an intergrated electric holding

[255]

company system under Title I of the Public Utility Act of 1935, the very Act which by Title II added Parts II and III of the Federal Power Act.

2. As compared to a vertically intergrated public utility company which normally sells a large percentage of its kilowatt hours to customers for consumption - non-jurisdictional kilowatt hour sales, it unfairly penalizes a generation and transmission company (such as the Company) which supplies the entire kilowatt hour needs of its associate companies – jurisdictional kilowatt hours.
3. By inclusion of gross kilowatt hours under interchange power agreements new Section 36.1(a) will add to the cost of power so interchanged and tend to discourage coordination of electric utility systems, contrary to the Congressional mandate in Section 202(a) of the Federal Power Act. Further, such kilowatt hours under interchange power agreements relate to coordination

[256]

and reliability, the administrative costs of which are covered by Section 36.1(b).

II

The assessment of costs of administration in excess of those directly related to a service rendered or privilege enjoyed constitutes the levy of taxes beyond the powers of the Federal Power Commission. As previously stated by the Commission:

> " . . . the assessment of user charges or other fees with respect to the exercise of our regulatory activities under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since *these activities are primarily for the benefit of the general public rather than the regulated companies.*" (Emphasis supplied). Notice of Proposed Rulemaking, Docket No. R-282, issued September 15, 1965, mimeo, page 2. (30 F.R. 12077, September 22, 1965).

III

An evidentiary hearing will establish the facts showing the lack of fairness and equity of the new Section 36.1, with respect to a generation and transmission company within a public utility holding company system, and demonstrating the economic influence of that Section upon the configura-

[257]

tion of generation ownership within a holding company system and the power transactions between utility systems. Such a hearing is required by due process of law.

WHEREFORE, the Commission should grant a rehearing of its Order No. 427 and provide (1) for an evidentiary hearing as to factual matters and (2) an opportunity for the Company to brief the legal and policy considerations referred to above. Pending a

final decision in this rulemaking proceeding, the effective date of the Rule should be stayed.

Respectfully submitted,

NEW ENGLAND POWER COMPANY

/s/ Guy W. Nichols

Guy W. Nichols
President

20 Turnpike Road
Westboro
Massachusetts 01581

April 15, 1971

[258]
Verification

The Commonwealth of Massachusetts
County of Worcester, ss.

The undersigned, Guy W. Nichols, being first duly sworn, states that he is President of New England Power Company, the applicant in the foregoing application for rehearing; that he has read said application and knows the contents thereof and that all the statements contained therein are true and correct to the best of his knowledge and belief.

/s/ Guy W. Nichols

Guy W. Nichols

Subscribed and sworn to before me this 15th day of April, 1971

/s/ Richard B. Dunn

Richard B. Dunn, Notary Public
My Commission expires May 22, 1975

[259]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr.,
John A. Carver, Jr.,
and Albert B. Brooke, Jr.

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	)	Docket No. R-408

ORDER DENYING REHEARING

(Issued May 14, 1971)

On November 25, 1970, we issued a Notice of Proposed Rulemaking in this proceeding (35 F.R. 18234, December 2, 1970) proposing to amend the general rules and regulations under the Federal Power Act and the Natural Gas Act to revise the schedule of fees proposed in connection with the filing of certain applications by natural gas companies and to establish new schedules of fees to be applicable to electric utility companies and natural gas companies.

We invited the submission of comments and suggestions by December 16, 1970, but pursuant to requests for additional time the return date was twice extended ultimately to February 5, 1971. Responses on the merits were timely received from 62 companies and two industry associations raising questions as to the meaning of various proposed revisions of our regulations, suggesting modifications for clarification or in the policy underlying the proposed changes in fee requirements, and objecting on various

grounds to the

[260]

imposition of fees or assessments generally or as to specific items. The comments and recommendations were considered by the Commission and were in substantial part discussed in Order No. 427, which we issued on March 18, 1971, amending our regulations.

Two industry associations, Edison Electric Institute (EEI) and Independent Natural Gas Association of America (INGAA), and four companies, Montana Power Company (Montana), New England Power Company (New England), Southern California Edison Company (Southern California), and Tennessee Gas Pipeline Company (Tennessee), have filed a petition and applications for rehearing, three of them, EEI, Montana, Southern California, on the ground that a conference which the notice of proposed rulemaking stated could be requested was not provided. That notice did not state that a conference would be afforded responsive parties but invited "[s]ubmissions to the Commission [of data, views, comments, and suggestions, in writing] * * * and whether the person filing them requests a conference at the Federal Power Commission to discuss the proposed amendments." It stated also that the "Commission shall consider all such written proposals before acting on the matters herein proposed."

Neither the Administration Procedure Act, 5 USC 553, nor our rules, nor the statutory authority upon which this action was taken require that conferences be held in connection with rulemaking proceedings of this kind. The only requirement relevant here is that after notice of proposed rulemaking, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments *with or without* opportunity for oral presentation * * *". (Emphasis supplied.) 5 USC 553(c).

It is our announced procedure that the Secretary or staff counsel upon the approval of the General Counsel and the Office or Bureau involved may call a public conference at which all parties who filed comments are invited to participate. As we

show, the grounds in sum urged by these three responding parties were in substance previously asserted in their comments or in the comments of other responding parties and were

[261]

considered by the Commission when the order was adopted. In these circumstances, we find no basis for holding that the staff abused its discretion in not scheduling a conference to discuss their objections.

EEI's application essentially amounted to a reiteration of the same grounds contained in the comments it had previously submitted and of which the Commission was apprised and which it considered when the order was issued. Its statement that it would have filed more comprehensive comments had it anticipated that a conference would not be held carries no weight since the purpose of a conference is to discuss the issues previously raised in the comments submitted in response to an invitation therefor in the notice of proposed rulemaking.

The contention (INGAA, New England, Southern California and Tennessee) that the amended regulations constitute a revenue measure and are violative of the Appropriation Act and Budget Circular A-25 on which they were based does not raise issues which were not fully considered when Order No. 427 was adopted, nor do the allegations of these petitioners suggest valid grounds for rehearing or reconsideration.

Montana and Southern California raise contentions regarding the fairness of the assessment of fees and charges on jurisdictional public utilities and licensees and upon nonjurisdictional revenues and further contend such fees and charges will be unlawfully borne by customers for services not subject to the Commission's jurisdiction. We initially proposed to collect fees and assessments for all the costs of administering Parts II and III of the Federal Power Act upon jurisdictional utilities, in part for specific services rendered in connection with prescribed applications and filings, and in remainder on the basis of the

proportion that the gross revenues of each regulated company bears to the total gross revenues of all such companies. As a result of the comments and suggestions submitted we agreed that such allocation would be inequitable since the nature of our administrative activities regarding utility regulation and those concerned with coordination and reliability could not both be fairly attributed to gross revenues.

[262]

In the first place, the costs of our administrative activities properly allocable to municipal and other nonregulated systems for either group of programs should not and will not be charged to jurisdictional utilities; secondly, the balance of the costs of administering the regulatory functions (after deduction of fees obtained for specific applications and filings) will more equitably be based on transfers of jurisdictional energy since the quantum of our services more nearly varies with the sales and deliveries of such energy; and, finally, the costs incurred in the promotion of greater coordination and reliability, being system wide and beneficial to a utility without regard to its jurisdictional business, are fairly allocable on a gross revenue basis.

However, New England asserts that as compared to a vertically integrated public utility which normally sells a large percentage of its (nonjurisdictional) kilowatt hours to customers for consumption, the regulation adopted unfairly penalizes a generation and transmission company which supplies the entire (jurisdictional) kilowatt hour needs of its associate companies principally for distribution. We considered the objection submitted by New England to the allocation of all costs of electric administration on the basis of gross revenues in response to our invitation for comments and in acknowledgment of the unfairness of the provision made appropriate revision, as described above, to avoid making annual charges to cover the costs of public utility regulation on the basis of gross revenues.

We think further revision is not required. Where the associated companies are solely in the business of distributing electric energy

not subject to Commission jurisdiction, no fees or other charges will be required of them and where they may have a limited amount of jurisdictional business the duplicative charges will be of little significance. In cases where jurisdiction attaches the services rendered which are subject to the specific fee schedules set out in Section 36.2 will not

[263]

be charged to utilities under the assessment provisions of Section 36.1. As to the remainder of the administrative costs of the regulatory programs (less that applicable to nonjurisdictional electric systems), the Commission's programs involve rate surveillance, accounting matters and formal proceedings including rulemaking matters. These activities are conducted for all jurisdictional utilities and we can think of no more equitable method of allocating those charges than on the basis of jurisdictional sales and deliveries of electric energy.

The jurisdiction conferred by the Federal Power Act is based on the transmission and sale at wholesale of electric energy in interstate commerce and were we to make allocations on a basis which exempted this applicant and others having the same corporate arrangement from their proportionate shares of the charges, such action would not be consistent with our responsibilities under that Act.

New England's contention that the inclusion of the costs of electric utility regulation will add to the cost of power which is interchanged and hence discourage coordination among utilities is recognized. However, we believe it will have no significant effect in view of the benefits accorded electric systems by the advantages interconnection provides in enhancing the reliability of service.

[264]

INGAA, Tennessee, and New England rely on dicta of the Commission in its notice of proposed rulemaking that culminated in the adoption of Order No. 317, as amended by Order 317-A, 31 F.R. 430, 4890, which added Part 159 to the Regulations under the

Natural Gas Act, as indicative of the Commission's lack of authority to broaden the scope of its charges to provide for the recoupment of certain costs of administration by assessment methods. We were mindful of these views but do not consider them binding upon us. These regulations, as our order pointed out, are predicated on the benefits accorded public utilities and natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress which in our opinion satisfy the statutory requirements for the imposition of these charges.

INGAA's and Tennessee's objection to assessing pipelines for the cost of producer regulation is much too broadly put. The assessment is limited to only one of the various producer programs: the certification of producer sales which plainly benefit pipelines through the Commission's control of the initial prices they are required to pay producers for gas purchases. The Commission's activities in this connection which provide clear benefits to pipelines through regulatory action include the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines.

Both Tennessee and INGAA challenge the fairness of allocating charges on the basis of jurisdictional deliveries. One objection is that no part of the assessments are based on direct sales by pipelines to industrial customers which are nonjurisdictional. We point out that the entire costs of administering the pipeline programs are not assessed on

[265]

the basis of jurisdictional deliveries since a substantial part thereof are made up by certificate application fees filed in connection with the construction of pipeline facilities. In this way, a significant portion of expenses of administering the pipeline programs will be made up by payments for the installation of facilities to

serve nonjurisdictional customers.

Another objection is that the method of allocation is unfair because it includes deliveries of natural gas between pipelines which, it is argued, sometimes involve double or triple counting of the same volumes of gas. While our method of allocation is somewhat imperfect, we think it is a reasonable method of allocating the portion of pipeline administration costs not obtained from certification of facilities and that it does not work a hardship on the pipelines. The fees paid in this connection by the pipelines form part of their lawful operating costs each pipeline may recover from the purchaser of their gas. More importantly, where several pipelines are involved seriatim in the delivery of the same volumes of gas, the regulatory responsibilities of the Commission are correspondingly increased.

Several of the applicants seek rehearing on the ground that there is no way to approximate the extent of the costs of regulation each utility or gas company will be obligated to pay. We do not think these objections meritorious. The basis for determining the fees to be charged in connection with miscellaneous matters, specified applications and filings, and assessments relating to new gas supplies are clearly set forth in Sections 3.102 (b), 36.2, 159.1 and 159.2a(b) of the Regulations. The remaining assessments predicated on the costs incurred in each fiscal year can be readily approximated from these sources: published data supplied by the Commission annually to the Congress in support of its request for appropriations which show the allocation to be made for each electric and gas program and information published by the Commission showing the gross revenues and sales and deliveries of electric energy by electric systems and jurisdictional sales of natural gas companies.

[266]

The Commission finds:

The assignments of error and grounds for rehearing and reconsideration set forth in the applications of EEI, INGAA, New

England, Southern California and Tennessee and in the petition of Montana which were filed in this proceeding present no facts or legal principles which were not fully considered by us, or which now being reconsidered by us would warrant any change or modification of the Commission's Order No. 427, issued March 18, 1971.

The Commission orders:

The petition and applications for rehearing and reconsideration of Order No. 427 are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

(S E A L)

Kenneth F. Plumb,
Acting Secretary.

(267)

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	))))))	Docket No. R-408

(May 14, 1971)

CARVER, Commissioner, dissenting:

This order is addressed essentially to those portions of Order No. 427 which I found unacceptable in my separate opinion in that docket, leaving me no alternative but to dissent herein.

/s/ John A. Carver, Jr.,

John A. Carver, Jr., Commissioner

In the Supreme Court of the United States

No. 72-1162

FEDERAL POWER COMMISSION, PETITIONER

v.

NEW ENGLAND POWER COMPANY, ET AL.

Order Allowing Certiorari

Filed May 14, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

The case is set for oral argument with No. 72-948.

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No. 72-1162

In the Supreme Court of the United States

OCTOBER TERM, 1973

FEDERAL POWER COMMISSION, PETITIONER

v.

NEW ENGLAND POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
A. Background	4
B. Proceedings before the Commission	7
C. The decision below	11
Summary of argument	12
Argument	13
The Federal Power Commission has authority under Title V of the Independent Offices Appropriations Act of 1952 to impose annual fees on companies subject to its jurisdiction in order to recoup a portion of its costs for administering the Federal Power Act and Natural Gas Act	13
A. Under Title V of the Independent Offices Appropriations Act of 1952, the costs of administrative services which specially benefit an entire regulated industry may be apportioned among the individual companies which comprise the industry	13
B. The services whose costs the Commission seeks to recoup through the assessment of annual fees provide the natural gas and electric utility industries with special benefits above and beyond those which accrue to the general public	16

517-810—73——1

Argument—Continued Page

C. Since the services to be supported by the Commission's annual fees provide special benefits to the natural gas and electric utility industries, above and beyond those which accrue to the general public from these services, charges for these services are appropriate notwithstanding the fact that the services may be conducted primarily for the benefit of the general public..... 21

Conclusion..... 26

CITATIONS

Cases:

Aeronautical Radio, Inc. v. *United States*, 335 F. 2d 304..... 20

City of Chicago v. *Federal Power Commission*, 385 F. 2d 629, certiorari denied *sub nom. Public Service Commission of Wisconsin* v. *Federal Power Commission*, 390 U.S. 945... 22

Clay Broadcasting Corp. v. *United States*, 464 F. 2d 1313, certiorari granted, May 14, 1973, *sub nom. National Cable Television Association* v. *United States*, No. 72-948... 7, 14-15, 24, 25

Federal Power Commission v. *Texaco, Inc.*, 377 U.S. 33..... 18

Fuels Research Council, Inc. v. *Federal Power Commission*, 374 F. 2d 842, affirming *Midwestern Gas Transmission Co.*, 34 F.P.C. 973..... 19

Gainesville Utilities Department v. *Florida Power Corp.*, 402 U.S. 515..... 20

Public Service Commission of the State of New York v. *Federal Power Commission*, 327 F. 2d 893..... 19

Cases—Continued Page
Public Service Commission of the State of New York v. *F.P.C.*, 462 F. 2d 853 18
Statutes and regulations:
Federal Power Act, 41 Stat. 1043, *et seq.*, as amended, 16 U.S.C. 791a, *et seq.* 2, 4
Section 10(e), 16 U.S.C. 803(e) 4
Section 201(b), 16 U.S.C. 824(b) 4
Section 201(e), 16 U.S.C. 824(e) 4
Section 301, 16 U.S.C. 825 10
Section 313(b), 16 U.S.C. 825*l*(b) 2
Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.* 2, 4
Section 2(6), 15 U.S.C. 717a(6) 4
Section 8, 15 U.S.C. 717g 10
Section 19(b), 15 U.S.C. 717*r*(b) 2
18 C.F.R. 11.20 4
18 C.F.R. 11.30 4
18 C.F.R. 260.7 9
Title V of the Independent Offices Appropriations Act, 1952, 65 Stat. 290, 31 U.S.C. 483a 2, 3, 4, 5, 6, 11, 12, 13–14, 15, 16, 21, 22
Miscellaneous:
23 FCC 2d 880, 35 Fed. Reg. 10988 7
97 Cong. Rec. 4908 23
Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices Appropriations for 1953, 82d Cong., 2d Sess., Pt. 1 (1952) 23
Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess. (1970) 7

Miscellaneous—Continued Page
Hearings before a Subcommittee of the House Committee on Appropriations on Public Works for Water and Power Development and Atomic Energy Commission Appropriation Bill, 1972, 92d Cong., 1st Sess., Pt. 3 (1971) 25
H. Rep. No. 384, 82d Cong., 1st Sess 23
H. Rep. No. 1348, 90th Cong., 2d Sess 6
Notice of Proposed Rulemaking, Docket No. R–408, issued November 25, 1970, 35 Fed. Reg. 18324 8
Order No. 317, 31 F.R. 430, January 13, 1966, as amended by FPC Order No. 317–A, 31 F.R. 4890, March 24, 1966 6
Order Nos. 455, *et al.*, issued in Docket No. R–441, August 3, 1972, pending review *sub nom. John E. Moss, et al.* v. *F.P.C.*, (C.A.D.C.), Nos. 72–1837, *et al* 19
Order No. 465, *et al.*, issued in Docket No. R–411 on December 29, 1972 pending review *Sub. nom. Public Service Commission of the State of New York* v. *Federal Power Commission*, No. 73–1338 (C.A.D.C.) 18
Phillips, *The Economics of Regulation* (1969) 19
Priest, 1 *Principles of Public Utility Regulation* (1969) 17
S. Rep. No. 1375, 90th Cong., 2d Sess 6
S. Rep. No. 2120, 81st Cong., 2d Sess 24

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1162

FEDERAL POWER COMMISSION, PETITIONER

v.

NEW ENGLAND POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 467 F. 2d 425. The order (No. 427) of the Federal Power Commission (Pet. App. 18a-50a) and its order denying rehearing (Pet. App. 51a-60a) are reported at 45 FPC 440 and 45 FPC 964.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1972 (Pet. App. 14a-15a), and the Commission's petition for rehearing was denied on September 25, 1972 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on February 22, 1973,

and was granted on May 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has authority under Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a) to recoup a portion of its costs of administering the Federal Power Act, 16 U.S.C. 791a, *et seq.*, and the Natural Gas Act, 15 U.S.C. 717, *et seq.*, through the imposition of annual fees on companies subject to its jurisdiction after taking into consideration the benefits such companies receive from Commission regulation.

STATUTE INVOLVED

Title V of the Independent Offices Appropriations Act, 1952, 65 Stat. 290, 31 U.S.C. 483a, provides:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-

sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further*, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

STATEMENT

This case involves the authority of federal agencies under Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a) to recoup their administrative costs from the companies they regulate. The court of appeals construed Title V as not authorizing the Federal Power Commission to assess

annual fees on public utilities[1] and natural gas companies[2] subject to its jurisdiction to recover the administrative costs of the Commission not recouped by specific filing and other fees (Pet. App. 1a–13a).

A. BACKGROUND

Since the enactment of the Federal Water Power Act of 1920, now Part I of the Federal Power Act, 16 U.S.C. 791a–823, the Federal Power Commission has assessed annual and other charges against licensees of hydroelectric projects to reimburse the government for the Commission's costs of administering the Act. The imposition of these charges is specifically authorized by Part I of the Act. See 16 U.S.C. 803(e) and (f); 18 C.F.R. 11.20, 11.30. Parts II and III of the Federal Power Act, 16 U.S.C. 824, *et seq.*, and the Natural Gas Act, 15 U.S.C. 717, *et seq.*, however, do not specifically direct the Commission to assess annual or other charges against companies subject to those statutes.

In 1951, long after the enactment of the Federal Power Act and the Natural Gas Act, Congress enacted Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a). The House report on Title V shows that Congress was concerned that fed-

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[1] Under Section 201(b) and (e) of the Federal Power Act, 16 U.S.C. 824(b) and (e), a "public utility" is defined as any person who owns or operates facilities for the transmission or sale of electric energy in interstate commerce.

[2] Under Section 2(6) of the Natural Gas Act, 15 U.S.C. 717a(6), a "natural-gas company" is defined as a person engaged in the transportation or sale for resale of natural gas in interstate commerce.

eral agencies were not receiving full return for many of the services they provide to special beneficiaries. The report noted that in some cases "no fees are charged even though the charging of fees is not prohibited * * *." H. Rep. No. 384, 82d Cong., 1st Sess., p. 2. To remedy this situation, Title V was proposed to

> * * * provide authority for Government agencies to make charges for * * * services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. * * * [*Id.* at 3.]

As enacted, Title V provides in essence that any work, service, benefit or privilege performed, provided or granted by any federal agency to any person (including groups, associations, organizations, partnerships, corporations or businesses) shall be self-sustaining to the fullest extent possible. Accordingly, federal agencies are authorized to prescribe fees and charges which are

> * * * fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *. [31 U.S.C. 483a.]

All amounts collected under the statute are to be paid into the United States Treasury as miscellaneous receipts.

Bureau of the Budget Circular No. A–25 (September 23, 1959; set forth in Pet. App. 61a–62a) estab-

517-210—73——2

lishes guidelines to assist agencies in the implementation of Title V. The circular directs that where a service bestows special benefits upon identifiable recipients "above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service" (*id.* at 61a). The circular states, for example, that a charge should be imposed where a government service "[p]rovides business stability or assures public confidence in the business activity of the beneficiary (*e.g.*, certificates of necessity and convenience for airline routes, or safety inspections of crafts) * * *" (*id.* at 61a–62a). The circular also provides that (*id.* at 62a):

> No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (*e.g.*, licensing of new biological products).

Pursuant to Title V and the Bureau of the Budget Circular, the Federal Power Commission in 1966 established a schedule of filing fees under the Natural Gas Act. Order Nos. 317 and 317–A, 35 FPC 30, 31 Fed. Reg. 430, 4890. Subsequent to the adoption of these fees, congressional appropriations committees recommended that federal agencies review their fee schedules with a view to making increases or adjustments to offset in part the increasing funds which had to be appropriated by Congress to cover the operating costs of the agencies. S. Rep. No. 1375, 90th Cong., 2d Sess., p. 3; H. Rep. No. 1348, 90th Cong., 2d Sess., p. 4. And in 1970, the chairman of a House appropria-

tions subcommittee specifically requested the Federal Power Commission to review its fees, and urged the Commission to assess sufficient charges against natural gas companies and electric utilities subject to its jurisdiction to sustain its administrative operations. The chairman noted with approval the proposed increased fees which had been announced by the Federal Communications Commission.[3] Those fees were subsequently adopted by the FCC (23 FCC 2d 880, 35 Fed. Reg. 10988) and upheld by the Fifth Circuit. *Clay Broadcasting Corp.* v. *United States,* 464 F. 2d 1313 (reproduced in Pet. App. 63a–81a), certiorari granted May 14, 1973, *sub nom. National Cable Television Association* v. *United States,* No. 72–948.

B. PROCEEDINGS BEFORE THE COMMISSION

Following an extensive review of its existing fee structure and its administrative operations, the Commission proposed (1) to increase the filing fees under the Natural Gas Act, (2) to establish filing fees for applications under Parts II and III of the Federal Power Act, and (3) to recoup a portion of the remaining costs of its regulatory programs under both Acts through annual assessments. Notice of Proposed Rulemaking, Docket No. R–408, issued November 25, 1970,

[3] Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., part 2, p. 951 (1970). The chairman's reference at the hearings to the Federal Communications Commission's "schedule of increased rates to make them self-sustaining" (*ibid.*) appears to make no distinction between filing fees and annual assessments, both of which were involved in the FCC's action at that time.

35 Fed. Reg. 18324. Following the receipt of comments by sixty-four parties, the Commission issued Order No. 427, adopting the proposed fees with several modifications (Pet. App. 18a–50a).[4]

Under the Commission's order, annual charges are assessed as follows: With respect to electric utilities, the Commission determines each year the costs of administering Parts II and III of the Federal Power Act other than those costs associated with the Commission's efforts to promote the coordination and reliability of electric systems. The Commission then deducts from the administration costs the costs associated with services rendered to electric systems not subject to the Commission's jurisdiction and the amounts received during the year from filing fees. The remaining balance is assessed against jurisdictional utilities in proportion to their wholesale sales and interchanges of electric energy. The costs of administering the Commission's reliability and coordination programs, after deduction of the portion of the costs attributable to nonjurisdictional utilities, are assessed against jurisdictional utilities in proportion to their gross revenues (Pet. App. 37a–38a).[5]

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[4] Only the portion of the Commission's order establishing annual charges was set aside by the court below. The new filing fees were not challenged and are now in effect.

[5] Documents filed with the Commission by the electric utility companies subject to the annual assessment here at issue show that in 1971 these companies had gross revenues of $21,093,709,000 and a total net income of $3,603,721,000. The projected 1973 annual assessment challenged here for all such companies is $5,137,484.00 or 0.024% of gross revenue and 0.14% of net income.

With respect to natural gas companies, the Commission determines each year the cost of administering the Commission's natural gas pipeline programs under the Natural Gas Act. These costs, after deduction of the amounts received from filing fees, are assessed against all natural gas companies with annual operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. In addition, all natural gas companies required to file an annual report on their total gas supply on FPC Form No. 15 (see 18 C.F.R. 260.7) are assessed one-tenth of a mill for each thousand cubic feet of new reserves of natural gas certificated each year (Pet. App. 45a–46a), to support the cost of the producer certificate program.[8]

In its order establishing the annual charges, the Commission identified the benefits accruing to utilities and natural gas companies from the administration of Parts II and III of the Federal Power Act and the Natural Gas Act. With respect to electric utilities, the Commission referred to the impact of its coordination and reliability programs on the stability and operations of the electric industry (Pet. App. 30a). With respect to both electric utilities and natural gas companies, the Commission noted that Federal regulation had provided "the foundation for the

[8] Documents filed with the Commission by the pipeline companies subject to the annual assessment here at issue show that in 1972 these companies had gross revenues of $9,404,223,445 and a total net income of $1,047,625,385. The projected 1973 annual assessment for all such companies is $4,802,630 or 0.051% of gross revenues and 0.46% of net income.

sound financial condition which public utilities and natural gas companies have achieved" (*id.* at 30a).[7] The Commission referred, in particular, to "industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system" (*id.* at 30a, n. 5). See 16 U.S.C. 825; 15 U.S.C. 717g. The Commission recognized, of course, that its regulatory activities provide continuing benefits to consumers, but also noted that its actions

> * * * have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. [Pet. App. 31a.]

In its order denying rehearing, the Commission again noted that its promotion of the coordination and reliability of the nation's electric systems was "system wide and beneficial" to electric utilities (Pet. App. 55a). With respect to natural gas companies, the Commission referred to the direct benefits pipelines receive from the Commission's regulation of the prices producers may charge for interstate sales of natural gas to pipelines. The Commission also identi-

[7] The Commission pointed out that the extension of its jurisdiction in 1935 to electric utilities "was prompted in substantial part by the deplorable practices of management which resulted in the collapse of the financial structures upon which the electric utility industry had been erected" (Pet. App. 30a).

fied other of its activities, in connection with the certification of producer sales, that benefit pipelines. The activities mentioned were (*id.* at 57a):

> * * * the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines.

C. THE DECISION BELOW

On petitions for review, the court of appeals set aside the portion of the Commission's order establishing annual charges, holding that the charges are not authorized by Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a) or Bureau of the Budget Circular No. A-25 (Pet. App. 1a-13a). In the court's view, the favorable "economic climate" resulting from federal regulation is not a benefit for which a charge can be made, since it is not a special service rendered to a special beneficiary (*id.* at 9a). The court concluded that the regulation of the electric utility and natural gas industries is "primarily for the benefit of the public" and that "[t]here is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public" (*id.* at 9a-10a).

Since it found the Commission to be without authority to act, the court of appeals did not reach the question whether the methods of allocation employed were proper (Pet. App. 2a).

SUMMARY OF ARGUMENT

A. The holding of the court of appeals that the constituent firms of whole industries cannot be "identifiable recipients" of special benefits from government services in the sense required by Title V and Budget Circular A-25 is without basis in the language of those provisions or in the statutory purpose. Title V in terms applies to "groups" of, as well as individual, special beneficiaries, and there is no reason for not applying this language in its natural sense where, as here, the group specially benefited consists of the entire membership of an industry.

B. The services whose costs will be supported by the Commission's annual fees provide special benefits to the Natural Gas and Electric Utility industries above and beyond those which accrue from these services to the general public. The Commission's regulatory activities have provided each of these industries with a favorable economic climate in which they have grown and prospered. By contributing to stabilization of rates and supply in both industries, Commission regulation has enhanced public confidence in and demand for their products, as against competing sources of fuel and energy. Specifically, natural gas pipelines have benefited in this way from the Commission's regulation of producers and from its regulation of pipeline rates, and electric utilities have similarly benefited from the Commission's coordination and reliability programs.

C. The fact that the Commission's activities are conducted primarily for the benefit of the general

public does not make the assessment of charges for these activities inappropriate under Title V. Since every governmental activity is intended primarily for the benefit of the public, the holding of the court of appeals on this point would, in effect, render the statute virtually meaningless. Neither the language nor the legislative history of Title V justifies such a restrictive interpretation.

ARGUMENT

THE FEDERAL POWER COMMISSION HAS AUTHORITY UNDER TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT OF 1952 TO IMPOSE ANNUAL FEES ON COMPANIES SUBJECT TO ITS JURISDICTION IN ORDER TO RECOUP A PORTION OF ITS COSTS FOR ADMINISTERING THE FEDERAL POWER ACT AND NATURAL GAS ACT

A. UNDER TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT OF 1952, THE COSTS OF ADMINISTRATIVE SERVICES WHICH SPECIALLY BENEFIT AN ENTIRE REGULATED INDUSTRY MAY BE APPORTIONED AMONG THE INDIVIDUAL COMPANIES WHICH COMPRISE THE INDUSTRY

The court of appeals held that whole industries cannot be "identifiable recipients" of special benefits in the sense required by Title V and Budget Circular A–25 to justify charges (Pet. App. 9a), and that Title V instead authorizes only specific charges for specific services to specific individuals or companies. This, we submit, is an overly restrictive interpretation of Title V. Nothing in the statute suggests that where work performed by a federal agency specially benefits the members of an entire industry, the costs of that activity cannot be apportioned among the companies which make up the industry. The only requirement in Sec-

tion 483a is that services be rendered "to or for any person (including *groups*, associations, organizations, partnerships, corporations, or businesses)" (emphasis added). This language surely does not mean that charges are permissible only when a government service specially benefits only one company. No purpose would be served by such an arbitrary limitation. In a situation where two or more individuals or companies specially benefit from a service, the statutory language is amply broad to authorize the natural result of apportioning the charges among those individuals or companies—regardless of whether the specially benefited group is coterminous with the entire regulated industry.

Similarly, the provision in the Budget Circular that services must provide "special benefits to an identifiable recipient" in order to be chargeable under the Act does not preclude the apportionment of the costs of services which specially benefit an entire industry among the members of that industry. Again this language requires only that the recipient of a benefit be "identifiable," and does not suggest that where services benefit more than one individual, each of those individuals cannot be an identifiable recipient. Where it is found that services specially benefit a whole industry, each company within that industry is an identifiable recipient of the special benefits, and the costs of the services which provide these benefits should be reasonably apportioned among those companies.

This interpretation of Title V was recently adopted by the Court of Appeals for the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States, supra.*

There the court found that the general regulatory activities of the Federal Communications Commission provided special benefits to the broadcast industry as a whole, and that the costs of those activities, therefore, could be apportioned among the members of that industry. The court of appeals also held that companies comprising the cable television industry, which did not operate under licenses issued by the FCC, received special benefits as a group from FCC regulation and approved the apportionment of the costs of this regulation among the members of that industry.

Thus, in the instant case, if, as we contend *infra*, the activities which the Federal Power Commission seeks to support through the assessment of annual fees provide special benefits to the natural gas and electric utility industries as a whole, the apportionment of the costs of these activities among the members of those industries should not be struck down on the ground that the recipients of these benefits are not sufficiently "identifiable."[8]

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[8] Contrary to the suggestion of the court of appeals (Pet. App. 9a), the fact that "each company" may not receive benefits "directly proportional to revenue"—the principal basis upon which the annual assessment is calculated—does not preclude a finding that the companies comprising the industry, as a group, are identifiable recipients of a special benefit. This argument at most goes to the issue whether the charges are "fair and equitable" (31 U.S.C. 483a). While the court of appeals here did not reach this issue, the Court of Appeals for the Fifth Circuit in the *Olay* case rejected the claim that such pro-rata charges are improper (464 F. 2d, at 1318, n. 6):

"We find no merit in the NAB's contention that these fees are in reality an unlawful tax because the money involved is

B. THE SERVICES WHOSE COSTS THE COMMISSION SEEKS TO RECOUP THROUGH THE ASSESSMENT OF ANNUAL FEES PROVIDE THE NATURAL GAS AND ELECTRIC UTILITY INDUSTRIES WITH SPECIAL BENEFITS ABOVE AND BEYOND THOSE WHICH ACCRUE TO THE GENERAL PUBLIC

Under the Commission's fee schedule, the cost of the following regulatory activities will be recouped through annual charges: (1) the producer certificate program; (2) pipeline rate regulation; and (3) the electric utility reliability and coordination programs. In addition, the portion of the costs of the Commission's pipeline regulation programs (other than rate regulation) and electric utility regulation programs which is not recouped from filing fees will be included in the annual assessments. These activities, of course, benefit the general public, but they also provide special benefits to the companies subject to the Commission's jurisdiction, above and beyond those accruing to the public. As the Commission significantly noted in Order No. 427 (Pet. App. 30a–31a):

> We recognize that the exercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial has provided

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not approximately equal to the *amount of work* rendered by the Commission in behalf of the party against whom the charge is made. The Commission is clearly entitled to charge such fees to recover its costs as are fair considering the value to the recipient, public policy and other pertinent facts. 31 U.S.C. § 483a. By the very terms of the statute 'value to the recipient' is not limited to the amount of work performed but also includes any '. . . . service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or other similar thing of value or utility . . .' *Id.*"

> continuing benefit to consumers, but our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands.

Without disputing the validity of the Commission's analysis, the court below simply held that "[t]he creation of an 'economic climate' is not a special service," but rather "an overly broad benefit" (Pet. App. 9a).

That holding is, we submit, contrary to Subsection (1)(b) of the Bureau of the Budget Circular, upon which the court of appeals purported to rely. That subsection specifically states that "a special benefit will be considered to accrue and a charge should be imposed" when a government service "[p]rovides business stability or assures public confidence in the business activity of the beneficiary" (Pet. App. 61a). This is precisely the kind of benefit that the electrical power and natural gas industries derive from the many regulatory services of the Commission. For example, the Commission's establishment and continued enforcement of a uniform accounting system, albeit ultimately benefiting the public, has made possible the rapid growth of the electric power and natural gas industries. As one writer has noted (Priest, 1 *Principles of Public Utility Regulation* 39 (1969)):

> It must now be said, as a matter of hindsight, that the stringent accounting regulation en-

forced by the FPC was not only in the public interest, but also in the best interests of the operating companies concerned. What had been dubious items— at least in the light of the new morality—were eliminated from books of account and capital structures became clean, trim and sound. It is questionable whether the electric utility industry would have been able to raise the more than fifty billion dollars which it has required for postwar expansion if these accounting reforms had not been made.

The other programs to be supported by the Commission's annual fees similarly provide special benefits to the assessed industries. With reference to the natural gas industry, interstate pipeline operators (which are the only assessed companies) receive such benefits from both the Commission's producer certificate program and its regulation of pipeline rates.

Among other things, producer regulation has provided pipeline companies with (1) the elimination of indefinite price provisions in producer contracts;[9] (2) standardization of the quality of gas delivered by producers; and (3) the establishment of reasonable terms and conditions regarding advanced payments for gas made by pipeline operators to producers.[10] Moreover, within the context of the overall regulatory scheme, the Commission has taken special steps to increase the

[9] *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33.

[10] *Public Service Commission of the State of New York* v. *Federal Power Commission*, 462 F. 2d 853 (C.A.D.C.); Commission Order No. 465, *et al.*, issued in Docket No. R-411 on December 29, 1972, pending review *sub nom. Public Service Commission of the State of New York* v. *Federal Power Commission* (C.A.D.C.), No. 73-1338.

interstate flow of gas during periods of shortage by authorizing expedited deliveries of gas through the issuance of temporary certificates [11] and by means of the recently promulgated optional certification procedure which is designed to increase the interstate gas supply.[12]

These efforts by the Commission to assure a more stable supply of natural gas, coupled with the Commission's regulation of pipeline rates to keep them at a just and reasonable level, have added to the competitive appeal of natural gas in the overall fuel market and thereby have encouraged consumers to invest in facilities for the use of gas.[13] Thus, while these aspects of the Commission's regulatory program, again, are designed for the benefit of the general public, they also confer substantial special benefits on the pipeline companies, warranting the assessments at issue here.

Similarly, with regard to the electric utility industry, the Commission's reliability and coordination programs enhance the ability of the electric utility companies to meet peak requirements with minimum generating capacity, and help ensure public confidence in the industry's ability to satisfy total demand. Indeed, the value of coordination between

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[11] See *Public Service Commission of the State of New York* v. *Federal Power Commission*, 327 F. 2d 893 (C.A.D.C.).

[12] Order No. 455, *et al.*, issued in Docket No. R-441, August 3, 1972, pending review *sub nom. John E. Moss, et al* v. *Federal Power Commission* (C.A.D.C.), Nos. 72-1837, *et al.*

[13] See, *e.g.*, *Fuels Research Council, Inc.* v. *Federal Power Commission*, 374 F.2d 842, 850-851 (C.A. 7), affirming *Midwestern Gas Transmission Co.*, 34 F.P.C. 978, 982; C. F. Phillips, Jr., *The Economics of Regulation*, pp. 625, 634 (1969).

electric utilities was acknowledged by this Court in *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515, where it was stated that to the extent that an electric utility may rely upon an interconnection to supply power during any temporary inability to meet its customers' requirements, "the utility is freed of the necessity of constructing and maintaining its own equipment" (*id.* at 520). Again, the resulting increase in reliability of service at lower cost (and the consequent enhancement of the industry's reputation) enable the industry to compete more favorably with other sources of energy.[14]

In sum, these substantial special benefits, derived by the companies comprising the natural gas and electric

[14] The remaining costs to be apportioned among the interstate pipelines and the jurisdictional electric utilities are the residual costs of the Commission's regulatory activities which are not recouped through filing fees and which are not otherwise recognized in the annual fees. These costs are mainly those incurred by the Commission in the processing of abnormally complex applications or filings. Under Title V these costs could clearly be assessed against the individual companies submitting these filings (and, indeed, the aspect of the Commission's order here establishing increased filing fees has not been challenged in this litigation). See, *e.g.*, *Aeronautical Radio, Inc.* v. *United States*, 335 F. 2d 304 (C.A. 7). Such a procedure, however, would necessitate a determination by the Commission of the cost of the processing of each filing, which would be both expensive and time consuming. In view of this fact and the facts that all jurisdictional companies benefit to some extent from the processing of every filing because of the precedents that evolve therefrom, and that virtually all of these companies participate as intervenors in many proceedings before the Commission each year, thereby placing their views before the Commission for consideration, the Commission's decision to apportion these residual costs is reasonable and permissible under the Act.

utility industries, differ significantly (as an economic matter) from the related benefits derived by the general public from the Commission's regulatory programs and thus justify the assessment of fees under Title V.

C. SINCE THE SERVICES TO BE SUPPORTED BY THE COMMISSION'S ANNUAL FEES PROVIDE SPECIAL BENEFITS TO THE NATURAL GAS AND ELECTRIC UTILITY INDUSTRIES, ABOVE AND BEYOND THOSE WHICH ACCRUE TO THE GENERAL PUBLIC FROM THESE SERVICES, CHARGES FOR THESE SERVICES ARE APPROPRIATE NOTWITHSTANDING THE FACT THAT THE SERVICES MAY BE CONDUCTED PRIMARILY FOR THE BENEFIT OF THE GENERAL PUBLIC

Although, as we have just shown, the benefits derived from Commission regulation by the members of the electric utility and natural gas pipeline industries differ substantially from the benefits received by the public generally, the court of appeals concluded that there is "something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public" (Pet. App. 9a–10a). Accordingly, in the absence of a "clear Congressional mandate" authorizing the imposition of charges in these circumstances, the court construed Title V to preclude such charges.

This construction (indeed, virtual nullification) of Title V, based apparently on the court's own view of desirable public policy, is contrary to both the purpose and the language of Title V. Every regulatory agency and every program enacted into law by Congress is intended principally to serve the public interest. If the fact that the public is the principal intended beneficiary of a particular program is suffi-

cient to defeat an assessment under Title V, then the statute could virtually never be successfully invoked (except, perhaps, by showing that a program was not achieving its intended effect of benefiting the public interest) and the congressional goal, expressed in the Act, that work performed by federal agencies be "self-sustaining to the full extent possible", would be defeated.

Moreover, the degree to which the general public might benefit from a particular government service is not cited in Title V as a factor bearing on whether a charge can be assessed against persons who receive special benefit from the service. The language of the Act indicates, instead, that special beneficiaries should be charged for all such services toward the end of making them self-sustaining. The only reference in the statute to the degree of public benefit comes later when "public policy or interest served" is listed as a factor to be considered in determining the fairness of the fee to be charged for particular services.[15]

[15] The fact that the Commission at one time took the position that charges should not be imposed for special benefits accruing from programs primarily adopted for the benefit of the public (Pet. App. 10a) does not preclude the Commission from reconsidering its position. As the court below observed in *City of Chicago* v. *Federal Power Commission*, 385 F. 2d 629, 637 (C.A.D.C.), certiorari denied *sub nom. Public Service Commission of Wisconsin* v. *Federal Power Commission*, 390 U.S. 945: "The Rule of Law does not forbid an agency from modifying its regulatory policy, and the courts have upheld policy revision many times. Indeed one of the signal attributes of the administrative process is flexibility in reconsidering and reforming of policy."

Similarly, the fact that "neither the Natural Gas Act nor Parts II or III of the Federal Power Act impose fees upon

The rather sparse legislative history of Title V confirms this view. In reporting out the measure as a late addition to an appropriations bill, the House Committee on Appropriations stated:

> The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries. * * * [H. Rep. No. 384, 82d Cong., 1st Sess., pp. 2–3].

Accordingly, the Committee explained:

> The bill would provide authority for Government agencies to make charges for these services [*i.e.*, services to special beneficiaries] in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. * * * [*id.* at 3.]

Nothing in the Report, or elsewhere in the legislative history (see 97 Cong. Rec. 4908), states that it would be inappropriate for an agency to charge for such services by means of annual assessments on the constituent companies of the specially benefited industry where, as here, there is no other provision of law prohibiting such charges. Indeed, one year earlier, in a Sen-

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companies for regulation costs", while such fees are expressly provided for in the administration of "Part I of the Act" (Pet. App. 13a), has no significant bearing on the issue here, since Title V expressly authorizes the imposition of fees and charges and was obviously intended to provide for charges in cases where no such authorization previously existed. See Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices Appropriations for 1953, 82d Cong., 2d Sess., Part 1, pp. 559–560 (1952).

ate committee report (which did not recommend specific legislation) on a study of twelve federal agencies to determine the advisability of increased charges to beneficiaries of federal services, it was specifically noted with reference to services rendered by the Federal Power Commission under the Natural Gas Act and the Federal Power Act that:

> The Federal Power Commission suggests that the imposition of levies upon the gross revenue of regulated enterprises would be an equitable method of recovery of related costs. [S. Rep. No. 2120, 81st Cong., 2d Sess., p. 12.] [16]

Thus, in light of the statutory language and its legislative history, Title V should not be construed to require a determination of whether each government service is conducted primarily for the benefit of the public. The question, instead, is, as stated in Bureau of the Budget Circular No. A–25 (Pet. App. 61a), whether there are "identifiable recipient[s]" of "special benefits * * * above and beyond those which accrue to the public at large * * *." Or, as the Court of Appeals for the Fifth Circuit correctly restated that standard in *Clay Broadcasting* v. *United States, supra,* "the inquiry under 31 U.S.C. § 483a is * * * whether the members of the industry have benefited in a manner different from the public at large from

[16] And more recently, the Commission was commended for promulgating the fee schedule under review in the instant case by Congressman Joe L. Evins, Chairman of the Public Works

the regulatory scheme provided by the Commission" (464 F. 2d at 1322).

In the instant case, as we have shown, the services to be supported by the Commission's annual fees do, under that standard, provide special benefits to the constituent companies of the natural gas and electric utility industries, and the court below accordingly erred in holding those fees to be unauthorized by Title V without regard to whether they are fair and reasonable.

Subcommittee of the House Committee on Appropriations. Chairman Evins addressed Commission Chairman John N. Nassikas as follows:

"At this point, Mr. Chairman [Nassikas], may I state that over the years the Independent Offices Subcommittee on which I served, has urged not only the Federal Power Commission, but the Federal Communications Commission, the Securities and Exchange Commission and others to revise their rate schedules. Many of them have done that. The Renegotiation Board by far more than returns its operating cost. I think the FPC is doing a good job. They have raised their fee rate schedule to $17 million from $7 million and your revised estimate for 1972 is $18,850,000. This will approach putting the FPC on a self-sustaining basis." [Hearings before a Subcommittee of the House Committee on Appropriations on Public Works for Water and Power Development and Atomic Energy Commission Appropriation Bill, 1972, 92d Cong., 1st Sess., Part 3, pp. 1164–1165 (1971)].

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1162

FEDERAL POWER COMMISSION, *Petitioner*

v.

NEW ENGLAND POWER COMPANY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement of Facts	4
Summary of Argument	10
Argument	14
I. Neither the General Annual Charge Nor the Added Reserve Fee Is Related to Specific Identifiable Benefits of Which the Pipeline Companies Are Specific Identifiable Beneficiaries	15
A. The General Annual Charge	16
B. The Added Reserve Fee	19
II. The FPC's Authority to Assess Fees Does Not Extend to the Imposition of Either the General Annual Charge or the Added Reserve Fee	21
A. Title V of the 1952 Independent Offices Appropriations Act Does Not Vest the Requisite Authority in the FPC	22
B. Legislative History	25
1. Senate Report No. 2120, 81st Cong., 2d Sess.	26
2. House Report No. 384, 82d Cong., 1st Sess.	32
3. Senate Report No. 1467, 84th Cong., 2d Sess.	36
4. Recent Congressional Observations	38
C. Administrative Construction	41
1. Bureau of Budget Circular A-25	41
2. Federal Power Commission	47
3. Federal Communication Commission	48
4. Interstate Commerce Commission	52
Conclusion	53

CASES CITED

Page

Aeronautical Radio Inc. v. *U.S.*, 335 F.2d 314 (7th Cir. 1964) *cert. denied*, 379 U.S. 960 (1965) 48, 49, 52
Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. 137 (1960) 17
Clay Broadcasting Corp. v. *U.S.*, 464 F.2d 1313 (5th Cir. 1972) pending on cert, *sub nom, National Cable Television Association Inc.* v. *United States*, Sup. Ct. No. 72-948 .....13, 15, 24, 50, 51
F.P.C. v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 17, 20
F.P.C. v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) 21
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 20
U.S. v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 51
U.S. v. *RCA*, 358 U.S. 334 (1959) 50
U.S. v. *Southwestern Cable Co.*, 392 U.S. 159 (1968) 16, 39, 50, 51

STATUTES

Federal Communications Act of 1934 as amended, 47 U.S.C. 151 *et seq.* 15-16

Federal Power Act, 16 U.S.C. 791, *et seq:*

Section 10(e) 11, 22
Section 10(f) 22

Natural Gas Act, 15 U.S.C. 717 *et seq:*

Section 4 16
Section 5 16
Section 7 16
Section 16 23

MISCELLANEOUS

Bureau of the Budget Circular A-25 .....5, 6, 10, 12, 13, 15, 41-47

97 Cong. Rec. 4809 (1951) 12, 34, 35

Ex Parte No. 246 "Regulations Governing Fees for Service Performed in Connection with Licensing and Related Activities" 326 I.C.C. 573 (1966) 52

30 Fed. Reg. 12077 (1965) 8, 14, 47

Page

FPC Order 317 issued January 5, 1966, 35 FPC 30 (1966) 4

FPC Regulations under the Natural Gas Act:

Section 159.1 .....4, 16, 18, 19, 20
Section 159.2 .....4, 16, 18, 19
Section 159.2a 7, 16, 17, 18

H. Rep. No. 384, 82nd Cong., 1st Sess. (1951) ..12, 32, 33, 34

H. Rep. No. 1348, 90th Cong., 1st Sess. (1969) 39-40

Independent Offices Appropriations Act of 1952, 65 Stat., 290, 31 U.S.C. 483a, Title V .....*passim*

S. Rep. No. 1375, 90th Cong., 1st Sess. (1969) 40-41

S. Rep. No. 1467, 84th Cong., 2d Sess. (1952) ..12, 36, 37, 38

S. Rep. No. 2120, 81st Cong., 2d Sess. (1951) 12, 26, 27, 28, 29, 30, 31, 32

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BRIEF FOR RESPONDENT TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a)[1] is reported at 467 F.2d 425. The initial order (No. 427) of the Federal Power Commission (FPC)

[1] "Pet. App." refers to the Appendix to the Petition filed in this case by the Federal Power Commission.

(R. 87-114) and its order denying rehearing (R. 144-151) are reported at 45 FPC 440 and 45 FPC 964, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1972 (Pet. App. 14a-15a), and the FPC's petition for rehearing was denied on September 25, 1972 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on February 22, 1973, and was granted on May 14, 1973 (R. 153). —— U.S. ——. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1), Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the FPC's activities (1) in discharging the accounting and rate regulation responsibilities imposed upon it by the Natural Gas Act over pipeline companies selling natural gas for resale in interstate commerce and (2) in processing applications filed by producers of natural gas for authorization to sell gas to such pipeline companies, result in "things of value or utility" to such pipeline companies [2] within Title V of the Independent Offices Appropriations Act, 1952, so as to authorize the FPC to recover the costs incurred by it in discharging these responsibilities through the assess-

[2] The FPC also brings before the Court a comparable question with regard to certain annual charges which it undertook to assess against electric utilities subject to regulation under the Federal Power Act, 16 U.S.C. 791, *et seq.* This question is treated in the separate brief being filed by respondent, New England Power Company.

ment of annual charges against such pipeline companies.[2]

STATUTE INVOLVED

Title V of the Independent Offices Appropriations Act of 1952, 65 Stat. 290, 31 U.S.C. 483a, provides:

> "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section

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[2] The question as stated in the FPC's brief (at p. 2) assumes that these FPC activities result in specific benefits to the pipeline companies within Title V. As indicated in the Question Presented set out in the text, that assumption is improper since it assumes the answer to the actual question involved.

shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price."

STATEMENT OF FACTS

By Notice of Proposed Rulemaking issued November 5, 1970 (R. 1-16), the FPC proposed to assess a "general annual charge" against all natural gas pipeline companies with annual gas operating revenues in excess of $1,000,000 subject to its jurisdiction under the Natural Gas Act.[4] This charge was designed to reimburse the FPC for its costs of regulating pipeline wholesale rates under that Act. The amount of the charges to be assessed each year against each pipeline company was to be determined by subtracting the amounts collected by the FPC in filing fees specified in a separate schedule [5] from its total costs of administering its natural gas pipeline programs under the Natural

[4] Respondent, Tennessee Gas Pipeline Company, a Division of Tenneco Inc., is a natural gas pipeline company subject to FPC regulation under the Natural Gas Act and has the requisite revenues.

[5] The FPC had earlier prescribed a specific schedule of fees in connection with the filing by pipelines of applications for various licenses, permits and sanctions required under the Natural Gas Act. (See Sections 159.1 and 159.2 of the FPC's Regulations Under the Natural Gas Act, originally adopted by Order 317 issued on January 5, 1966, 35 F.P.C. 30, 392, (1966). Its Notice of Proposed Rulemaking also proposed to increase these fees (See R. 14-15). There is no question here as to the validity of these fees either as originally adopted or as here increased by the FPC.

Gas Act in that year and assessing the remainder among the pipeline companies in proportion to their total deliveries of natural gas in interstate commerce in that year.

By this Notice, the FPC also proposed to assess an "added reserve fee" against each pipeline company which was "required to file an Annual Report—Total Gas Supply on FPC Form No. 15" (R. 16). This fee was to be based on "one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form." (R. 16).

Citing Title V of the Independent Offices Appropriations Act, 1952 (*supra* pp. 3-4) and Bureau of the Budget Circular A-25 (Appendix, *infra,* pp. 54-59)[6] as authority for these proposed charges, the FPC's Notice explained its reasoning underlying the proposed general annual charge as follows (R. 5):

> "The remaining costs [after deduction of the filing fees] of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings."

With regard to the "added reserves fee", the FPC observed (R. 5):

> "We also propose to adopt a fee schedule which will return to the Treasury the costs of the pro-

[6] Circular A-25 is dated September 23, 1959 and was issued by the Bureau of the Budget pursuant to Title V's directive that steps be taken to assure that the fees assessed under that Title by the various Government agencies "be as uniform as practicable and subject to such policies as the President may prescribe." See *supra,* p. 4. For the convenience of the Court, Circular A-25 is reproduced in its entirety in the Appendix.

> ducer certificate program based upon the annual commitments of new reserves to the pipelines for interstate deliveries. For reasons of administrative convenience these charges would be paid by the pipelines on the basis of new reserves reported as certificated during each reporting period."

Following the submission of written comments by interested industry associations and companies including Tennessee, the FPC, on March 18, 1971, issued Order No. 427 adopting the annual charges here under review with several modifications not now relevant.[7] Holding that the assessment of these charges came within its authority under Title V of the 1952 Appropriations Act and Budget Circular A-25, the FPC stated (R. 97-98):

> "We recognize that the exercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial has provided continuing benefit to consumers, but our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands."

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[7] Among these modifications was a change in the basis for determining each pipeline's share of the total to be recouped by the general annual charge. The FPC had originally proposed the allocation on the basis of each company's *total interstate deliveries* In Order No. 427, however, it proposed to make the allocation on the basis of each company's *total jurisdictional deliveries*. This change had the effect of unreasonably and arbitrarily imposing a greater proportion of these costs upon these pipelines, such as Tennessee, the bulk of whose natural gas pipeline business is for resale rather than for direct use or consumption.

Accordingly, the FPC promulgated, as part of its schedule of fees and charges to be paid by natural-gas companies contained in Part 159 of its Regulations Under the Natural Gas Act, a new Section 159.2a reading in pertinent part as follows (R. 108-109):

"§ 159.2a Annual Charges.

"Reasonable annual charges will be assessed by the Commission against natural gas companies to reimburse the United States for costs of administration of the Natural Gas Act, as hereinafter provided:

"(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's natural gas pipeline programs from which shall be deducted the amounts received during the same period pursuant to the provisions of §§ 159.1 and 159.2 of this Part. The difference shall constitute the adjusted costs of administration of such programs for such period.

"(1) The adjusted costs of administration determined under paragraph (a) of this section shall be assessed against each Class A and Class B natural gas company in the proportion that the total jurisdictional gas deliveries of such natural gas company in the calendar year terminating in such fiscal period bear the sum of the jurisdictional gas deliveries of all Class A and B natural gas companies for the like period.

"(b) In addition to the annual charges prescribed by paragraph (a) of this section, each natural gas company required to file an Annual Report—Total Gas Supply on FPC Form No. 15 shall be assessed one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form."

Thereafter, applications for rehearing were filed (R. 120-126, 132-136), claiming, *inter alia*, that the FPC lacked authority to prescribe annual charges designed to reimburse it for its estimated annual costs of pipeline rate regulation. In this regard, it was pointed out that in an earlier proceeding in Docket No. R-282, fixing fees to be paid primarily in connection with the filing of pipeline certificate applications, the FPC had acknowledged its lack of such authority, with the statement:

> "The [FPC] has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate *since these activities are primarily for the benefit of the general public rather than the regulated companies.*" (See 30 Fed . Reg. 12077).[8]

However, in its order denying rehearing issued May 14, 1971 (R. 144-151), the FPC dismissed its earlier statement as dictum and held instead that its authority under Title V to assess fees extended to the assessment of the general annual charge since it is

> "* * * predicated on the benefits accorded public utilities and natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress which in our opinion satisfy the statutory requirements for the imposition of these charges." (R. 149)

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[8] Emphasis supplied throughout unless otherwise noted.

Continuing, the FPC reaffirmed its assessment of the added reserve fee against the pipelines, stating (R. 149):

> "* * * The assessment is limited to only one of the various producer programs: the certification of producer sales which plainly benefit pipelines through the [FPC's] control of the initial prices they are required to pay producers for gas purchases. The [FPC's] activities in this connection which provide clear benefits to pipelines through regulatory action include the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines."

On appeal, the court of appeals set aside both general annual charge and the added reserve fee. The court pointed out that the FPC's accounting and rate regulation of natural gas pipelines

> "* * * is primarily for the benefit of the public. Their charter statutes require them to so act. The courts have so held (fn. omitted). There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the [FPC] must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here. (Pet. App. 9a-10a)

Further, the court below noted that the FPC's claim that the pipeline industry had benefited within Budget Circular A-25 by virtue of the creation of a favorable "economic climate"

> "* * * missed the point. The creation of an 'economic climate' is not a special service nor is a particular pipeline or gas company the 'special beneficiary' of such a climate any more than any other pipeline, gas company or the consumer in general. Indeed, under the [FPC's] order petitioners would be liable for the annual assessment despite the fact that they had no proceedings before the [FPC] for that year. In effect, then, the contemplated charges would have no relation to specific services or benefits rendered. The [FPC] must then fall back upon its 'economic climate' argument which is obviously an overly broad benefit particularly in light of the requirement that the charges be for a 'measurable unit of service.'" (Pet. App. 9a)[9]

SUMMARY OF ARGUMENT

I.

The problem here concerns the FPC's authority under Title V of the 1952 Appropriations Act to assess the particular charges here involved, not its authority to assess charges generally. One of these charges is the general annual charge which, *inter alia*, is intended to recoup the FPC's costs of discharging its rate responsibilities under the Natural Gas Act designed to protect the ultimate consumers from excessive rates and which

[9] In so holding, the court of appeals did not reach the further questions as to the propriety of the methods of allocation used by the FPC. Hence, should this Court reverse the court of appeals, the case should be remanded to that court to resolve these additional issues.

is assessed without regard to any specific or identifiable service or benefit to the pipeline or pipeline industry in the year involved, and solely on the basis that the pipeline has the requisite status. The other charge is the added reserve fee which is unique in that it is imposed upon the *pipelines,* although it is designed to recover the FPC's costs of processing applications by producers to sell gas to pipelines, and although, apart from the producers themselves, the ultimate consumers, rather than the pipelines, benefit from these FPC producer activities.

II.

A. The Natural Gas Act vests no fee authority in the FPC. Title V which does grant such authority, contains no provision, comparable to Section 10(e) of the Federal Power Act, 16 U.S.C. 803(e), authorizing the FPC to assess charges to recoup its regulatory costs generally. The charges here involved do not satisfy the requirements of that statute, which on its face permits fees only for (1) the providing of a specific identifiable benefit *i.e.,* "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate registration or similar theory of value or utility", (2) to specific identifiable persons or entities *i.e.,* to "any person (including groups, associations, organizations, partnerships, corporations or businesses)" as distinguished from the public or even an entire industry generally.

B. Title V's legislative history reaffirms such limited scope. The Senate Committee on Government Operations[10] was of view (1) that fees should be

[10] Formerly the Senate Committee on Expenditures in the Executive Departments.

charged only for services "to special interests to which benefits * * * accrue at the expense of all the taxpayers" (S. Rep. No. 2120, 81st Cong., 2d Sess., p. 1) and (2) in contradiction to the FPC argument (Br. pp. 12-13, 21-25), that "where there is a joint benefit to a particular beneficiary and to all the people * * * and * * * there is doubt as to the degree or preponderance of benefit, there should be no fee" (*Id.* at pp. 3-4). The Committee's example of a situation where fees would be inappropriate (*Id.* at p. 5), closely parallels that here involved since in both the governmental action, while directed at benefiting the public generally, also operated to stimulate confidence in the regulated companies.

Both the report of the House Appropriations Committee which added Title V as a rider to the 1952 Appropriations Act (H. Rep. No. 384, 82d Cong., 1st Sess.), and the comments of Congressman Yates on the House floor (97 Cong. Rec. 4809 (1951), make it clear that the legislation was directed at the imposition of fees provided for "services which [the Government] renders to special beneficiaries". Similarly, the report issued shortly after the enactment of Title V, by the Senate Committee on Government Operations (S. Rep. No. 1467, 84th Cong., 1st Sess.), strongly indicated its satisfaction that Title V adhered to the views earlier expressed by it in S. Rep. No. 2120, *supra.*

C. The administrative interpretation—that of the Bureau of the Budget in Circular A-25, in particular —likewise indicates that the charges here involved are beyond Title V's authorization in at least two respects. First, they are not "to [an] identifiable

recipient for a measurable unit or amount of service or property from which he recovers a special benefit" within Paragraph 3 of Circular A-25. Second, they violate the prohibition of subparagraph 3(a) (2) thereof against charging for services where the "identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public."

While Circular A-25 also refers to "business stability" as a basis for assessing fees, it is in the context of specific agency actions directed to identifiable beneficiaries. The favorable "economic climate" which the FPC has allegedly created for the pipeline industry is not the result of any specific FPC action but rather the culmination of the FPC's activities over a period of years, activities which the FPC undertook primarily to benefit the ultimate consumers with the benefits to the pipelines being at most incidental by-products.

Finally, the interpretation of Title V by the FCC and the Fifth Circuit in the *National Cable Television* case, also pending on certiorari is not inconsistent with that of the court below here. The fees there involved do not reflect recovery of costs of FCC rate regulation—the FCC has no jurisdiction over the rate charged by CATV operators. Moreover, both the FCC and the Fifth Circuit recognized that Title V required special identifiable benefits to special beneficiaries. Both also held that such benefits in fact resulted to the CATV operators. Petitioner there is questioning not the requirements of Title V but rather whether in fact the CATV operators received the requisite benefits.

ARGUMENT

As noted, *supra*, the FPC's Order 427 here under review undertakes, *inter alia*, (1) to require most natural gas pipeline companies to pay a general annual charge designed to recoup the costs incurred by the FPC in that year in regulating rates of natural gas pipelines subject to its jurisdiction under the Natural Gas Act and (2) to require most pipeline companies to pay an "added reserve fee" designed to recover the FPC's costs of processing applications filed by producers for authority to sell natural gas to the pipeline companies.

These charges which are thus here involved, are in addition to various other fees assessed by the FPC in connection with specific applications and requests filed by the applicants, as to which there is no question raised here. In other words, the issues here relate to the propriety under Title V of only certain of the charges or fees which the FPC has undertaken to assess; there is no question here as to the FPC's authority to assess fees under Title V generally under appropriate circumstances.

In support of its imposition of the charges which are here in issue, the FPC has asserted, in direct contradiction to its earlier ruling in Docket No. R-282 (*supra* p. 8), that its regulation of the rates of these natural gas pipelines "primarily benefit" these pipeline companies (R. 96) and that, accordingly, since the general annual charge is "predicated on the benefits accorded public utilities and natural gas companies by the creation of regulatory agencies at the federal level," it satisfies "the statutory requirements for the imposition of [such] charges." (R. 149)

The court of appeals disagreed with the FPC and in effect adopted the Commission's earlier ruling by holding that the costs which the charges here involved were designed to recover were incurred by the FPC in the discharge of responsibilities imposed upon it by Congress primarily to benefit the general public and not to confer specific identifiable benefits upon the pipelines which are the subject of that FPC regulation, and hence that the FPC had no authority under Title V to assess these charges.

We show below that the court of appeals was eminently correct in holding that both of the charges here involved are in fact unrelated to any specific identifiable benefits to the pipeline companies as specific identifiable beneficiaries within Title V of the 1952 Appropriations Act and Bureau of Budget Circular A-25.

I.

NEITHER THE GENERAL ANNUAL CHARGE NOR THE ADDED RESERVE FEE IS RELATED TO SPECIFIC IDENTIFIABLE BENEFITS OF WHICH THE PIPELINE COMPANIES ARE SPECIFIC IDENTIFIABLE BENEFICIARIES

In order to put this case in proper focus, it is important at the outset to distingusih between the charges which are here involved and those which are not. Such delineation is, we believe, of particular importance in light of the fact that the instant case has been set for argument in tandem with *National Cable Television Association Inc.* v. *United States,* Sup. Ct. No. 72-948, involving the validity of an annual charge imposed by the Federal Communications Commission (FCC) upon CATV systems, which are subject to regulation by the FCC under the Federal

Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.* See *United States* v. *Southwestern Cable Co.*, 392 U.S. 159 (1968).

A. The General Annual Charge

At the outset, it should be noted that not only does the FPC's Order No. 427 here under review itself characterize the general annual charge as an "annual charge * * * to reimburse the United States for the costs of administration of the Natural Gas Act" (R. 109), but, as that order also recognizes (R. 96-97, 149) that charge was designed primarily to recoup the costs incurred by the Commission in regulating pipeline rates as provided by Congress in the Natural Gas Act.

This is confirmed by the operation of the formula provided in Section 159.2a(a) (R. 109; see *supra* p. 7) for determining that charge. Thus, under that formula the general annual charge is to recover the portion of the total "cost of administration of the Commission's natural gas pipeline programs" left after deducting "the amounts received * * * pursuant to the provisions of §§ 159.1 and 159.2 of this Part." As shown *infra,* Sections 159.1 and 159.2 prescribe filing fees to be paid with applications for various licenses, permits and sanctions which the Natural Gas Act empowers the FPC to issue, including authorizations to expand services or facilities under Section 7 of the Natural Gas Act. Accordingly, the costs remaining after deducting these fees are those relating primarily to the FPC's rate regulatory responsibilities under Sections 4 and 5 of that Act, the other major area of regulation provided by that Act.

As the court below pointed out (Pet. App. 9a) it has long been settled—and repeatedly reaffirmed by

this Court—that the primary purpose of the FPC's rate responsibilities under the Natural Gas Act is to protect the general public as represented by the ultimate consumers. See *e.g., F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610-611 (1944); *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 137, 147 (1960). Thus, as the FPC recognized (R. 96-97), this Court in *Hope* held that Congress addressed the Natural Gas Act to the "special evils" disclosed by the Federal Trade Commission investigation (320 U.S. at 610); ruled that "the fixing of 'just and reasonable' rates (§ 4) with the powers attendant thereto (fn. omitted) was the heart of the new regulatory system." (*Id.* at 611); and concluded that "those provisions were plainly designed to protect the consumer interests against exploitation at the hand of private natural gas companies" (*Id.* at 612).

Further, it is noteworthy that the general annual charge is not a predetermined fixed amount. Instead, the amount which a pipeline must pay in any given year would vary with the interaction of the four factors set out in the formula contained in Section 159.2a(a) (R. 109, *supra* p. 7): (1) the amount determined by the FPC as the cost in that year of administering its natural gas pipeline programs;[11] (2) the amount collected by the FPC in that year as pipeline certificate filing fees; (3) the sum of the total jurisdictional deliveries of all Class A and B natural gas companies in that year and (4) the total jurisdictional gas deliveries in that year of the particular pipeline being assessed.

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[11] This determination is to be made by the FPC apparently without hearing or participation by the pipelines.

Also, and equally important for present purposes, the annual charge thus to be assessed against a pipeline would be unrelated to any specific or identifiable service performed for, or benefit provided to, that pipeline over and above that provided the public generally. Under the FPC's proposal, a pipeline is required to pay an annual charge as determined under the proposed formula even if during the year involved the pipeline had not filed any application with the FPC; had not sought any benefit or service from the FPC; and had not invoked the FPC's processes in any other way. Indeed, under Order No. 427, a pipeline would be liable for the annual charge even if during the year covered it was not involved in any proceeding or matter, formal or informal, instituted by the FPC, the pipeline or anybody else. In short, all that would be required for a pipeline to be liable for the general annual charge is that it have the status of a Class A or B natural gas pipeline subject to the FPC's jurisdiction under the Natural Gas Act during the year involved.

The general annual charge thus imposed by Section 159.2a under Order No. 427 differs dramatically from the application fees assessed under Sections 159.1 and 159.2 of the FPC's Regulations. For example, Section 159.1 provides:

> "A filing fee of $50 shall accompany each of the following
>
> "(a) Applications for exemption under section 1(c) of the Act;
>
> "(b) Applications to import or export natural gas under section 3 of the Act;
>
> "(c) Applications for permits under Executive Order 10485;

"(d) Applications and petitions to intervene in which applicant or petitioner is requesting an order under section 7(b) of the Act;

"(e) Applications for permission and approval to abandon under section 7(b) of the Act;

"(f) Applications for certificates of public convenience and necessity under sections 7(c) and (e) of the Act;

"(g) Applications for determinations by the Commission under section 5 of the Outer Continental Shelf Lands Act; and

"(h) Amendments to any of the applications listed in paragraphs (a) through (g) of this paragraph and those referred to in § 159.2(c)." [12]

In providing for the payment of a fixed fee or determinable amount of money in connection with the filing of a request for a permit, authorization, sanction or certification, which is within the FPC's jurisdiction to grant under the Natural Gas Act, the fees set out in Sections 159.1 and 159.2 expressly relate to specific requests for FPC action whereby the applicant presumably was seeking a specific benefit or dispensation not otherwise available to it.

B. The Added Reserve Fee

Perhaps the most outstanding and unique feature of the added reserve fee is that it is based on the "new reserves certificated" which reflects the result of the FPC's grant of *applications filed by producers for certificates to sell gas to pipelines for resale.* In these circumstances, if anybody other than the public benefitted from the issuance of these certificates, it obvious-

[12] See, also, Section 159.2, as amended by Order 427 (R. 217-218).

ly would be the producers who applied for them. In this respect, the situation is comparable to fee schedules provided by the Commission in Section 159.1 in connection with pipeline certificate applications where the fee is assessed against the pipeline applicant. Not only is the proposed assessment of the costs of producer certificate regulation upon the pipelines basically inconsistent with the Commission's approach in assessing the costs of pipeline certificate regulation upon the pipelines themselves, but it reaches the incongruous result of imposing the costs incurred in connection with *both* the pipeline *and* producer regulation upon the pipelines.

Moreover, contrary to the Commission allegation the pipelines do not receive "special benefits" from these producer certification activities so as to justify the imposition of the costs of those activities upon pipelines. As pointed out *supra*, p. 17, the Natural Gas Act is designed and intended primarily to benefit the ultimate consumers. In addition, each of the "benefits" allegedly accruing to pipelines as a result of the Commission's producer certificate activities benefit the ultimate consumers as much, if not more, than the pipelines. This is particularly so since under the cost-of-service method used by the Commission in fixing pipeline rates subject to its jurisdiction (*cf. e.g., F.P.C. v. Hope Natural Gas Co., supra*) [13] pipelines are required to pass on such benefits as result, according to the FPC (R. 149), from FPC regulation of "initial prices [the pipelines] are required to pay producers

[13] Pipeline rate regulation is still on an individual company cost of service basis rather than an area rate basis such as that used by the FPC for producers. See *e.g. Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

for gas purchases," and "the elimination of indefinite price escalation provisions."

The alleged benefits also referred to by the FPC as stemming from "the [FPC] issuance of temporary certificates to expedite deliveries, * * * and the [FPC] control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines" (R. 149) are also tied in with and are a part of benefits which those FPC activities are intended and designed to provide the ultimate consumers, *i.e.*, to assure that gas will be available to satisfy the requirements of these consumers so that their homes, offices, schools and hospitals, etc. which utilize gas will have the gas they need. *Cf. F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). Whatever benefits result to pipelines from these FPC activities are merely incidental by-products and fall far short of constituting special benefits above and beyond those which apply to the public at large.[14]

II.

THE FPC'S AUTHORITY TO ASSESS FEES DOES NOT EXTEND TO THE IMPOSITION OF EITHER THE GENERAL ANNUAL CHARGE OR THE ADDED RESERVE FEE

As just shown, neither the general annual charge nor the added reserve fee is related to any identifiable special benefits to any specific pipeline, group of pipelines, or the pipeline industry generally. We will now show that the court below properly held that the pow-

[14] This is also true with respect to the "special steps [taken by FPC] to increase the interstate flow of gas during periods of shortage" (FPC Br. pp. 18-19). See *F.P.C.* v. *Louisiana Power & Light Co.*, *supra*.

er vested in the FPC by Title V is limited and does not extend to the imposition of fees and charges such as those here under review. This is not to suggest that Congress may not bestow such authority upon the FPC. To the contrary, as noted by the FPC (R. 2, fn. 1), Section 10(e) of Part I of the Federal Power Act (16 U.S.C. 803(e)) explicitly authorizes it to require a licensee under that Act to "pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose [*inter alia*] of reimbursing the United States for the costs of the administration of this Part; * * *." See also Section 10(f) of the Federal Power Act, 16 U.S.C. 803(f). However, there is no comparable delegation, express or implied, in the Title V or the Natural Gas Act authorizing the FPC to impose the general annual charge or the added reserve fee. Accordingly, as stated by the court below (Pet. App. 10a):

> "In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here."

A. Title V of the 1952 Independent Offices Appropriations Act Does Not Vest the Requisite Authority in the FPC

Putting aside Sections 10(e) and (f) of the Federal Power Act mentioned earlier which obviously do not provide the authorization for the charges here involved, the FPC's only authority to assess fees and charges upon natural-gas companies subject to its jurisdiction under the Natural Gas Act stems basically, as the FPC recognizes (R. 2-3, 92-93), from Title V of

the 1952 Independent Offices Appropriations Act, *supra*, pp. 3-4. Significantly, there is nothing in the Natural Gas Act itself—nor does the FPC now attempt to claim otherwise [15]—with regard to the assessment of fees and charges.

Title V, which applies generally to the various agencies and departments of the Federal Government, provides in pertinent part as follows (see, also *supra* p. 3):

> "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency * * * to or for any person (including groups, associations, organizations, partnerships, corporations or businesses) * * * shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *."

This provision, we submit, patently was not intended to authorize the Commission to impose the charges here under discussion. Title V on its face permits the assessment of fees and charges only when the following two conditions are met: One, there must be the

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[15] The FPC has apparently abandoned its claim, asserted in the court of appeals, that Section 16 of the National Gas Act, 15 U.S.C. 717o also provided the requisite authority (See Pet. App. 11a-13a).

providing of specific, identifiable benefits, *i.e.*, "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility" and, two, the thing provided must be to specific identifiable persons or entities, *i.e.*, to "any person (including groups, associations, organizations, partnerships, corporations or businesses") as distinguished from the public or even an entire industry generally.

As stated by the Fifth Circuit in *Clay Broadcasting Corp.* v. *U.S.*, 464 F.2d 1313, 1322, pending on certiorari *sub nom National Cable Television Association, Inc.* v. *U.S.*, Sup. Ct. No. 72-948, (Pet. App. 63a at 79a).

> "* * * the inquiry under 31 U.S.C. 483(a) is not whether the regulated industry likes or agrees with all the regulations prescribed, but whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the [FCC]. CATV operators in effect merchandise the broadcast signals which the [FCC] has authorized by its regulation. The scarcity of television outlets which exists under the [FCC's] regulation of the broadcast market structure creates much of the economic value of the distant signal importation by CATV. It is therefore clear that CATV operators do receive benefits of real value from the [FCC's] regulation of CATV and the related broadcast media."

In contrast, neither of these two prerequisites are met by the charges here involved. See *supra*, pp. 16-21. As noted by the court below here (Pet. App. 9a):

> "* * * under the [FPC's] order petitioners would be liable for the annual assessment despite the

> fact that they had no proceedings before the [FPC] for that year. In effect then, the contemplated charges would have no relation to specific services or benefits rendered. * * * Furthermore, the statutory language—'to or for any person'—as well as the Budget Circular require an identifiable recipient. The [FPC's] inadequate response that the identifiable recipient is the whole industry assumes that each company receives a benefit directly proportional to revenue. This assumption is erroneous in that in any given year some companies may require substantial services from the [FPC] while others may neither require nor desire them."

That Congress recognized that Title V was limited in scope and was not intended to vest the various agencies with general authority to assess fees, particularly fees designed to recoup the agency's full costs of operations is indicated by the further language in Title V to the effect that the fees to be assessed thereunder by a particular agency should be such as to make the agency "self-sustaining *to the full extent possible*". In other words, that provision obviously recognized the schedule of fees prescribed by an agency may well fall short of recouping its full costs of operations, thereby implicitly negating the propriety thereunder of charges designed to recover all the costs incurred by an agency in discharging the responsibilities delegated to it by the statute administered by it, regardless of the nature and purpose of these responsibilities.

B. Legislative History

That Title V was not intended to vest the government agencies with comprehensive authority with regard to fees and charges is clear from the pertinent

legislative materials. Thus, these legislative materials demonstrate that Title V was intended merely to provide for fees in certain clear situations, *i.e.*, in situations where there are special benefits to special beneficiaries, with the thought that authority to assess fees and charges for further agency services or activities would be provided by particularized agency legislation sponsored by the committee having responsibility for substantive legislation with respect to that agency. The fact that no such legislation was enacted subsequent to Title V with regard to particularly the Federal Power Commission, serves to demonstrate that that agency's authority to assess fees and charges is limited to fees for special benefits provided to special beneficiaries.

1. Senate Report No. 2120, 81st Cong., 2d Sess.

Although Title V was enacted in the first session of the 82nd Congress, the problem as to the imposition of fees and charges by Federal departments and agencies was not new and was the subject of consideration and study well before that time. For present purposes, it is sufficient, we believe, to begin our review of the legislative consideration of the problem with Report No. 2120 in the second session of the 81st Congress, issued on July 20, 1950 by the Senate Committee on Expenditures in the Executive Departments (now the Senate Committee on Government Operations).

In that report, which bears the caption "Fees for Spcial Services", the Senate Committee sets out its conclusions on "the practicability and propriety of establishing fees for services which the Federal Government renders to special interests" (S. Rep. No.

2120, p. 1). In considering that question, the Committee indicated that its study was directed at:

> "* * * determining the feasibility of offsetting items now necessarily included in the Federal budget as nonreimbursable by transferring the financial burden thereof to the special beneficiaries. *Thus, at the outset, it is desired to draw a clear line of distinction between services which the Federal Government renders, either upon request or by law, to special interests to which benefits thereby accrue at the expense of all the taxpayers, and services for which the Government is inherently liable and the benefits of which accrue to the people at large.*" (*Ibid*)

Thereafter, under the heading of "Conclusions" the Committee stressed the desirability that fee authority be tailored to the different situations of different agencies by "individual acts of Congress drafted by specialists in special fields" (*Id.* at p. 3):

> "* * * there has been no quarrel with the philosophy governing the study that those who receive the benefit of services rendered by the Government especially for them should pay the costs thereof. In the several staff reports and press releases which have been issued, occasion has been taken to reiterate that philosophy and to give reassurance that there is no thought here to establish a system of fees for fundamental Government services, but only to explore the feasibility and fairness of shifting to special beneficiaries the expense now being borne for them by the taxpayers at large.
>
> "At the outset, there had been considered the possibility that this committee itself would cause the drafting and introduction of appropriate general legislation to bring about the desired ends. The study has, however, demonstrated clearly that the field is far too broad to be covered by general

> legislation; it must instead, if practical results are to be obtained, be covered by individual acts of Congress drafted by specialists in special fields. This report should provide a useful guide to the standing committees of the Congress having such jurisdictional authority."

However, the Committee emphasized its view (1) that the costs for special services should be borne by those benefiting specially therefrom, and (2) that where the public benefits jointly with a particular beneficiary, there should be no fee against the special beneficiary unless the "preponderance of benefits" is clearly to him (*Id.* at 3-4):

> "The committee does not herein aline itself either for or against the assessment of fees. Such a decision can prudently be made only after full and exhaustive hearings. There is no doubt, however, that of the 12 agencies included in this study, some render services the benefits of which accrue wholly to special interests which derive therefrom the means of financial success. The committee does incline to the view that, in such instances, the cost to which the Government is put should be borne by the beneficiaries. *Where there is joint benefit to a particular beneficiary and to all of the people, the cost should be equitably divided, and where there is doubt as to the degree or preponderance of benefit, there should be no fee.*"

At this point, it might be helpful to digress by noting the above comment of the Committee answers in large measure the FPC's arguments (1) that while the general public were the primary beneficiary of the FPC's activities covered by the charges here involved, its imposition of these charges nevertheless was appropriate because the pipeline companies also benefitted

from these activities (Br. pp. 21-22) and (2) that "the degree to which the general public might benefit from a particular government service is not cited in Title V as a factor bearing on whether a charge can be assessed against persons who receive special benefit from the service" (Br. p. 22).

Returning to the Senate Committee Report, the Committee then went on to provide "a few illustrative examples * * * for the purpose of demonstrating the line of demarcation * * * which we feel must constitute the guiding philosophy of subsequent legislative or administrative action". Thus, on the one hand, the Committee pointed out (*Id.* at p. 4)

> The Federal Communications Commission renders a tremendous variety of services, a substantial number of which would lend themselves to equitable fees. The Commission processes applications and grants permits for the construction and operation of commercial radio stations. Such an operating permit is in effect a franchise to a segment of the radio audience. The Federal Government sees to it that the right to that audience is not disturbed, and the operator is thus able to insure to purchasers of time over his facilities access to the market addressed. Construction permits constitute the Commission's heaviest workload, involving in an increasing number the necessity of formal hearings so as to provide a sound basis for granting or denying an application. This is a costly process and one which the Government renders without charge. True, the applicant himself may be put to some personal expense in the filing of his application and through attendance at a subsequent hearing, but he does not defray any of the cost to which the general public is put to conduct a proceeding which may assure to the applicant a remunerative business under special Federal protec-

tion. This is an outstanding example of a service for which a fee may most appropriately be assessed.

In contrast, the Committee observed (*Id.* at p. 5):

"On the other hand, the Federal Government is engaged in many costly undertakings which at first glance seem to fall within the category discussed above but which, upon closer examination, are clearly services for which no charge could in propriety be made. Amply illustrative of this category is the meat-inspection service of the Department of Agriculture. Historically, this service was begun by the act of June 30, 1906. At that time, the Congress gave consideration to financing the program through assessments against the meat-packing industry. The idea was abandoned, however, apparently for two major reasons: (1) It was thought that by empowering a Federal agency to assess fees there would be an abdication by the Congress of one of its most important functions; and (2) that if the industry financed the inspection, the service might thereby tend to become discredited. In any event, the Federal meat-inspection service has continued at public expense since inception. * * * This instance is an excellent example of a service rendered by the Government for the good of all the people and serves, too, to emphasize the necessity of preserving a scrupulous line of demarcation between general and special services."

The meat inspection situation in which the Senate Committee regards the imposition of fees as inappropriate parallels closely that here involved. This, together with the Committee's dichotomy between services resulting in special benefits to special beneficiaries and services benefitting the public generally (*supra,*

p. 27), serve to demonstrate the invalidity of the Power Commission's *reductio ad absurdum* argument (Br. p. 21) that rejection of its construction of Title V would constitute "virtual nullification" of that provision. There can be no question that the meat packing industry benefits from such inspection services in the sense that the Power Commission asserts the pipeline industry benefits from its discharge of its responsibilities to the consuming public. In both situations the governmental activity involved operates to provide a context, or as the FPC put it "an economic climate" (R. 97), resulting in a "greater usage of the services" of the companies subject to the regulation. In other words, the confidence in the pipeline industry which the FPC claims resulted from its regulation, also resulted in the meat packing industry from the meat inspection services provided by the Agriculture Department. And, since the Senate Committee cited the meat inspection service by the Agriculture Department as a clear example of a situation where the assessment of a fee to recover the costs of the service provided would be improper, it follows, we submit, that the charges which the FPC seeks to impose to recoup the costs incurred by it in discharging its responsibilities to the ultimate consumers are equally invalid.

One last word with regard to this Senate Committee report. The FPC purports to find support for its position in this Senate report since, as quoted by the FPC, this report also states (Br. p. 24):

> "The Federal Power Commission suggests that the imposition of levies upon the gross revenue of regulated enterprises would be an equitable method of recovery of related costs. [S. Rep. No. 2120, 81st Cong., 2d Sess., p. 12.]"

However, the sentence thus quoted by the FPC is taken out of context, and as a result, gives an erroneous impression. This sentence appears at the end of a paragraph which reads in its entirety as follows:

> "Federal Power Commission
>
> *"The committee recommends consideration of the several licensing functions of this agency.* Fees are now charged pursuant to law to licensees under part 1 of the Federal Power Act. The Commission also issues certificates of public convenience and necessity to natural gas companies under the Natural Gas Act and administers certain regulations under part II of the Federal Power Act. The Federal Power Commission suggests that the imposition of levies upon the gross revenue of regulated enterprises would be an equitable method of recovery of related costs." [S. Rep. No. 2120, 81st Cong., 2d Sess., p. 12]

Read in context, it is apparent (1) that the sentence quoted by the FPC relates to the *form of proposed fee,* not to the *activities for which the fee is to be imposed* and (2) that whatever the FPC recommendation, the Senate Committee itself recommended fees only in connection with special services provided to special identifiable beneficiaries as distinct from the public generally.

2. House Report No. 384, 82nd Cong., 1st Sess.

The views of the House Committee on Appropriations with respect to Title V, which it added as a rider to Independent Offices Appropriation Bill, 1952 are set out in House Report No. 384, 82d Cong., 1st Sess. This report is dated April 27, 1951, and hence followed closely upon S. Rep. No. 2120, just discussed which bears a July, 1950 date.

In its report, the House Committee (at p. 2) expressed its concern "that the Government is not receiving *full return from many of the services which it renders to special beneficiaries.*" In addition, the Committee obviously was aware of Senate Report No. 2120[16] as well as of the activities of other Congressional committees with regard to the assessment of fees since its expressly notes its understanding (at pp. 2-3).

> "* * * that other committees of the Congress have interested themselves in this matter and that studies now are under way which may result in further legislation to require that adequate consideration be received for such services."

However, the Committee went on, "such studies are necessarily time-consuming and the required legislation may not be enacted for a considerable time" (p. 3). Accordingly, the Committee advised (at p. 3) that it

> "* * * has inserted language in the bill (Title V, page 60) which would authorize and encourage the charging or increasing of fees to the extent permitted under present basic laws, but which would in no way conflict with studies now under way to effect changes in such basic laws."

It is thus apparent from the House Committee observations that Title V was intended merely as a stop-gap measure designed to cover the more obvious situations in which it believed the assessment of fees to be appropriate, *i.e.*, situations which clearly involves spe-

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[16] As made clear in the later report of the Senate Committee, a copy of S. 2120 was sent to the respective jurisdictional committees. See S. Rep. No. 1467, 84th Cong., 2d Sess., p. 3.

cial identifiable services for special identifiable beneficiaries. As such, Title V plainly was not designed to cover the entire ambit of possible fees and charges which could be assessed. Instead, the question of the further fees and charges which might be appropriate with regard to particular departments and agencies was left for further legislation sponsored by the appropriate committees.

Similar views on the scope of Title V were expressed by Congressman Yates, a Committee member, on the floor of the House. See 97 Cong. Rec. 4809 (1951). In explaining the thrust of the proposed legislation, Congressman Yates used the Federal Communication Commission as an example *(Ibid):*

> "The Federal Communications Commission grants franchises, licenses, certificates of convenience and necessity, if you will, to all broadcasting stations upon application for such licenses, franchises, and certificates. The Commission undertakes extensive hearings first in connection with a construction permit; secondly on the question as to the allocation of the position of a particular broadcaster in the spectrum of megocycles over which the Federal Communications Commission has control. That is a pretty difficult job and a complicated job, and entails extensive hearings by the Federal Communications Commission. The taxpayers pay every dollar of the charges and of the costs that go into that hearing. The companies pay nothing, other than taxes, and I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum

> which it occupies, that it should pay some of the costs of the hearings. It is perfectly proper that the franchised company make a profit, and there has been much profit making. Such companies should assume a greater share of the costs because regulation is necessary."

Also, Congressman Yates made it clear that the Committee did not envision Title V as containing the authorization necessary for the various agencies to recoup their *entire* costs of operations *(Ibid):*

> "Each of the Commissioners who appeared before us was asked his opinion as to whether or not it was feasible to *charge for a portion of the operations of* the agency and in each event the Commissioner thought that it would be practicable. Not only that, one Commissioner expressed the viewpoint that such a practice would not only be feasible but would deter and do away with many superfluous applications. Therefore, the subcommittee in its deliberations decided to put a new legislative section into the bill which would permit each of the agencies to appraise its own operations to see whether or not it would be possible to recapture for the Government *some of the costs* that the Government incurs in connection with this regulation through the establishment of a schedule of fees."

These observations of Congressman Yates thus made it clear that Title V's grant of authority to assess fees and charges permitted such fees only with regard to specific identifiable benefits to specific identifiable beneficiaries, and not to enable the department or agency involved to recover its costs of administration generally from the companies subject to its regulation.

3. Senate Report No. 1467, 84th Cong., 2d Sess.

The enactment of Title V did not put a stop to the legislative concern, studies and hearings with regard to the assessment of fees for services. Much of these post-enactment activities are summarized in S. Rep. No. 1467, 84th Cong., 2d Sess., issued by the Senate Committee on Government Operations (formerly the Committee on Expenditures in the Executive Department) in February 1966.

Although, as pointed out in this report, various of the jurisdictional committees held hearings on legislation which, if enacted, would have vested specific fee authority in particular agencies, no action was taken to enact such legislation. S. Rep. No. 1467, 84th Cong., 2d Sess. at pp. 7-8. In addition, it further noted that several of the regulatory agencies, such as the FCC and the FPC, had suspended action on proposed specific fee schedules at the request of the Senate Committee on Interstate and Foreign Commerce. *Id.* at pp. 9-11, 198, 200, 208, 217.

In the course of discussing this post-Title V fee activity, the Senate Committee made several observations which are highly pertinent on the question now before this Court. Thus, in summarizing the background of the problem, the Committee first discussed its earlier report in S. Rep. No. 2120, *supra*, pp. 26-32. In this connection the Committee noted that it had expressed the view in S. Rep. No. 2120

> "* * * that in establishing a policy, a clear line of distinction should be drawn between services which the Federal Government renders either upon request or by law to *special interests* to which benefits thereby accrue at the expense of all the taxpayers and services for which the Gov-

ernment is inherently liable and the benefits of which accrue to the public at large.

"The report stressed that there was no thought of establishing a system of fees for fundamental Government services but only to explore the feasibility and fairness of shifting to special beneficiaries the expenses being for them by the taxpayers at large * * * *" (p. 3)

Further the Committee emphasized that in S. Rep. No. 2120, it had pointed out

"* * * that—

'There is no doubt that of the 12 agencies included in [the] study, some render services the benefits of which accrue wholly to special interests which derive therefrom the means of financial success.

'The Committee did incline to the view that in such instances, the costs to which the Government is put should be borne by the beneficiary and recommended that—"where there is a joint benefit to the particular beneficiary and to all the people, the cost should be equitably divided and where there is doubt as to the degree or preponderance of benefit there should be no fee." ' " (p. 4)

Later, the Committee discussed Title V. In this regard, the Report first quoted the significant portion of H. Rep. No. 384, *supra*, p. 33, and then reproduced the entire text of Title V preceded by the following summarization (S. Rep. No. 1467 at p. 7):

"The full text of title V of that act, authorizing each Federal agency head to prescribe fair and equitable fees so as to make special services, where appropriate, self-sustaining to the fullest extent possbile and by determining, in case none exists, equitable fees for such services, follows".

Since the Committee then turned to the activities of the Bureau of the Budget and the other Congressional committees on the assessment of fees without any unfavorable amount with respect to Title V, it is apparent, we submit, that the Committee was satisfied that Title V adhered to the views and recommendations expressed in S. Rep. No. 2120 and reiterated in S. Rep. No. 1467. Accordingly, inasmuch as the FPC charges here involved clearly fell outside the area of appropriate fees envisioned by that Committee (see *supra*, pp. 28-31) it follows that the court below properly set aside as beyond the FPC's authority under Title V, the new charges here involved which Order No. 427 undertook to impose upon the pipeline companies.

4. Recent Congressional Observations

In support of its result, the FPC refers to the fact that the Appropriations Committees of Congress have in recent years, been urging the various agencies, such as the FPC, to increase its fees and charges so as to become more self-sustaining (see R. 4, 93). And in this connection, the FPC points out (Br. pp. 24-25, fn. 16) that it has been "commended" in 1971 by the Chairman of the Public Works Subcommittee of the House Appropriations Committee "for promulgating the fee schedule under review."

But it is, of course, well settled that

> "* * * the views of one Congress as to the construction of a statute adopted many years before by another Congress has very little, if any, significance. *Rainwater* v. *United States*, 356 U.S. 590, 593; *United States* v. *Price*, 361 U.S. 304, 313; *Haynes* v. *United States*, 390 U.S. 85, 87,

n. 4." (*U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968)).

Here, there is a lapse of at least twenty years between the enactment of Title V and the "commendation" thus relied on by the FPC. Consequently, if the FPC intends to imply from these references that the Appropriations Committee of Congress now read Title V as vesting authority in the FPC to assess fees such as the charges here involved, the implication is patently without substance.

Thus, the "commendation" related to the monies to be collected by the proposed fees, not the basis on which the fees are assessed. In other words, the Chairman was pleased with the amount which the FPC indicated would be collected under its proposed fee schedule. The Chairman, however, made no reference or comment with regard to activities for which the FPC intended to assess the proposed fees.

This omission is particularly significant since despite such urgings and commendations, the Appropriations Committee not only expressly recognized that the fee authority provided in Title V extended only to the charging of fees in connection with providing of special benefits to special identifiable recipients above and beyond those accruing to the public at large, but have made no attempt to enlarge upon the fee authority thus vested in the agencies by Title V. Thus, in its report on the 1969 Independent Offices and Department of Housing and Urban Development Appropriations bill, the House Appropriations Committee summarized Title V as

"* * * providing for the collection of fees by the Federal government for services rendered. It

> authorizes each agency head to prescribe *a fee or charge for benefits, privileges, authority, use and other things of value* which is determined to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served." (H. Rep. No. 1348, 90th Cong., 1st Sess., p. 4)."

Further noting that "[a] number of agencies provided for in this bill collect fees or charges for licenses or services rendered," the Committee went on to express its

> "concern that *the Federal government is not receiving sufficient return for all the services which it renders to special beneficiaries. This is particularly noteworthy with respect to the value to the recipient of certificates franchises and operating permits.* For instance, the license fees paid in the multibillion dollar radio and television industry are negligible in comparison to the value of these franchises. Other operating rights granted by agencies and commissions of Government have substantial values to the recipients. Accordingly, the Committee recommends that the applicable agencies review their schedule of fees and charges with a view to making increases or adjustments as may be warranted, taking into consideration *beneficial certificates and privileges granted,* to offset in part the increasing needs for direct appropriations for operating costs of the agencies concerned." *(Ibid.)*

To the same effect is the report of the Senate Appropriations Committee on this bill (S. Rep. No. 1375, 90th Cong., 1st Sess., p. 3):

> "The committee joins with the House committee in its concern that the Federal Government is not receiving sufficient return for all the services which it renders *to special beneficiaries,* and in its recommendation that the applicable agencies

review their schedule of fees and charges with a view to making increases or adjustments as may be warranted, taking into consideration *beneficial certificates and privileges granted,* to offset in part the increasing needs for direct appropriations for operating costs of the agencies concerned."

The references in these Committee reports to "services * * * rendered to special beneficiaries" and to "beneficial certificates and privileges granted" evidence the understanding of these Committees that, as we have been urging throughout this brief, Title V authorizes the assessment of fees only in connection with applications for specific and special benefits to the applicants above and beyond those which accrue to the public generally. As so limited, the Title V fee authority does not extend to the imposition of the charges here involved.

Consequently, if the construction of a statute by a Congress 20 years after its enactment were significant, it is apparent that such constructon adds further support to the reading of Title V by the court below rather than the construction being urged by FPC.

C. Administrative Construction

The administrative construction of Title V has similarly recognized that the fees authorized thereunder must be only for the providing of specific identifiable benefits to specific identifiable beneficiaries as distinct from the public generally.

1. Bureau of Budget Circular A-25

Pursuant to Title V's directive of assuring that the fees assessed by the various Government agencies "be as uniform as practicable and subject to such policies

as the President may prescribe" (see *supra* p. 3), the Bureau of the Budget promulgated its Circular A-25 in its present form on September 23, 1959.[17] As the Commission recognizes, that Circular "sets forth for agency action the scope of user charges activities, [and] guidelines for carrying out the policies prescribed therein." (R. 4, fn. 2; see also R. 201).

Of particular relevance here are the following provisions of Circular A-25 (See also *infra* pp. 55-56):

> "3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.
>
> "a. *Special services.*
>
> "(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:
>
> "(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop

[17] Circular A-25 was first issued on November 25, 1953 and revised on November 13, 1957.

insurance, or a license to carry on a specific business); or

"(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

"(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

"(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products)."

The charges here under review run counter to Circular A-25 in at least two obvious respects. In the first place, they do not fit within paragraph 3's criteria for imposing charges. Plainly, as pointed out by the court below (Pet. App. 9a) these charges are not "to [an] identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit." This is particularly so since, as shown *supra*, pp. 16-17, 20-21 the regulation provided by the Natural Gas Act does not "provide special benefits" to any pipeline individual-

ly or the pipeline industry generally above and beyond those which accrue to the public at large.

In the second place, the assessment of these costs violates subparagraph (2)'s prohibition against the charging for services "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." This prohibition is especially relevant here, since, as pointed out earlier, Congress has authorized the expenditure of the funds representing the costs of pipeline regulation to benefit the ultimate consumers. Consequently, to the extent that any ultimate beneficiaries of such regulation are identifiable, they consist of the ultimate consumers of the gas. This is in line with the Supreme Court's repeated holdings, noted earlier, that the primary purpose of the Natural Gas Act is to protect the consuming public against excessive rates by natural gas companies.

Consequently, the costs incurred by the FPC in connection with its rate regulation activities fall squarely within the observation of the Senate Committee on Government Operations (formerly the Senate Committee on Expenditures in the Executive Departments) in S. Rep. No. 2120, *supra* at pp. 27-28, and S. Rep. No. 1467 *supra,* pp. 36-37, as well as that in the separate statement herein by Commissioner Carver (R. 113), that:

> "As a basic philosophical premise, I do not believe that general governmental functions, unrelated to special services or privileges extended by the sovereign, should be made self-sustaining through levies upon particular persons or industries. Regulation in the public interest is conducted for the benefit of the general public; it

> ought to be financed out of the general fund of the Treasury is the same manner as other governmental functions." See also *supra,* pp. 9-10, Pet. App. 9a-10a.

The FPC claims (Br. pp. 16-17, see also R. 97-98) that the general annual charge comes within the criteria of Circular A-25 because the charge relates to the costs incurred in discharging its "responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial" and although such regulation "has provided continuing benefits to consumers," it has also

> "redounded to the benefit of [the natural gas] industr[y] by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands."

But, as pointed out *supra,* pp. 27 and 36 the Senate Committee on Government Operations explicitly recommended against the imposition of a fee "[w]here there is a joint benefit to a particular beneficiary and to all the people * * * and where there is doubt as to the degree or preponderance of benefit." Moreover, such an alleged "economic climate" obviously does not constitute a "special service" within the criteria of Circular A-25. To be sure, as the FPC urges (Br. p. 17) Circular A-25 refers to "business stability", but it is in the context of specific agency actions directed to identifiable beneficiaries "(e.g., certificates of necessity and convenience for airline routes or safety inspection of craft)"

(See Pet. App. 61a-62a). Order No. 427 here involved also contains a schedule of fees to be paid in connection with requests for comparable FPC actions (*i.e.*, applications for certification of public convenience and necessity under the Act) and there is no question here as to the validity of these fees.

In contrast, as noted *supra* pp. 30-31, the alleged beneficial "economic climate"[18] is no different for the beneficial results of the meat inspection service provided by the Agriculture Department and which the Senate Committee on Government Operations utilized to illustrate the type of situations in which the imposition of fees would be unwarranted. In any case, such alleged beneficial "economic climate" is not the result of specific actions taken by the FPC with that objective in mind as contemplated by Circular A-25. Rather, that "climate" at best came about as the culmination of the FPC's activities over a period of years and resulted from the reaction of the financial community to the FPC's discharge generally of the responsibilities imposed on it by the Congress. Moreover, even if FPC rate regulation has been beneficial to the pipelines individually or the natural gas pipeline industry generally, they have not been "special", or even the primary, beneficiaries of that regulation. In light of the primary thrust of the statute, any benefits to the natural-gas pipelines would at most be incidental by-products, or intermediate steps on the FPC's way to the discharge of its responsibilities to the consuming public.

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[18] The finding of such beneficial "economic climate" is itself questionable since it is based solely upon a report issued by the FPC in 1950, more than 20 years ago (See Pet. App. 30a-31a, fn. 5).

Similarly, no special benefits resulted to the pipeline industry justifying the FPC's assessment of the added reserve fee. To the contrary, each of the "benefits" allegedly accruing to the pipelines individually or the pipeline industry generally as a result of the FPC's producer certificate activities is in fact intended to benefit the consuming public rather than the pipeline industry. See *supra,* pp. 19-21.

2. Federal Power Commission

Prior to the FPC's issuance of Order No. 427, the FPC had recognized at least on one occasion that Title V did not vest authority in it to impose the type of charges here under review. Thus, as noted *supra,* pp. 8, 14, in connection with its earlier fee fixing proceeding in Docket No. R-282, the FPC expressed the opinion that

> "* * * the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate *since these activities are primarily for the benefit of the general public rather than the regulated companies.*"

The FPC (Br. p. 22, fn. 15) now attempts to brush off its statement in Docket No. R-282 as constituting a matter of FPC regulatory policy which, under established principles, it has ample authority to change. But, whether or not the FPC has the authority to make such assesments under Title V is not a matter of FPC policy. Nor is it a matter of interpretation of a statute, the administration of which has been delegated to the FPC. Rather, as discussed in detail elsewhere herein, it is a question of the scope and thrust

of Title V of the 1952 Appropriations Act and Bureau of the Budget Circular A-25 and since these apply to all agencies and not just the FPC, it is apparent that the interpretation of these writings are not matters as to which the Commission has special expertise, as to which its interpretation is entitled to special deference, or as to which the Commission is free to change its interpretation as a matter of policy.

3. Federal Communications Commission

The Federal Communications Commission first adopted rules providing for a schedule of fees in 1963. 28 Fed. Reg. 4658, 10911 (1963). That schedule was subjected to judicial review in *Aeronautical Radio Inc.* v. *U.S.*, 335 F.2d 314 (7th Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). As summarized by the Seventh Circuit, the *Aeronautical* case involved a schedule promulgated by the Communications Commission "prescribing fees for applications for licenses to use the public air waves for radio purposes" (335 F.2d at 306). As further noted by that court (*Id.* at 308), that schedule

> "* * * was broken down into three categories: Broadcast Services, including AM, FM, and television broadcast stations with fees for new stations ranging from $50.00 to $100.00[6] Safety and Special Radio Services, including non-broadcast users of radios—other than common carriers, amateur aviation, marine and citizens—with application fees ranging from $4.00 to $30.00;[7] and

"[6] The fee for a three year television license is $100.00; for a radio license (AM and FM), $50.

"[7] The fee for a five year amateur radio license is $4; in the Citizens Radio Service, $10 and $8; for Fixed Microwave Radio Stations, $30.

Common Carrier Services, with fees ranging from $5.00 to $100.00.[8] There were several exclusions from the schedule, such as police, fire and other governmental users of radio; users on a non-profit basis essentially for public health, safety and welfare; and educational, hospital, disaster relief organizations and like users."

[8] The fee, for example, for Mobile Radio Service Base Stations is $100; and for a five year license in the Aviation Services, $10."

Since the FCC has no jurisdiction over the rates charged by radio and TV licensees, the fees involved in *Aeronautical* did not relate to matters as to which the FCC exercised rate jurisdiction, much less were they directed to the recoupment of the costs of rate regulation by the FCC. Moreover, the fees involved in that case were to be paid in connection with requests by specific and identifiable applicants for special services or authorizations of special value to the applicants. Indeed, the great value of the radio and television licensees has been among the primary reasons advanced in support both of the enactment of Title V in 1951. See *supra* pp. 34-35.[9]

[9] The FPC (R. 202) also relied on the *Aeronautical* case as support for its claim that the fee to be charged for a particular service need not be supported by detailed cost records and could be fixed on the basis of average costs. Whatever the validity of that claim as an abstract proposition, it has no applicability to the annual charge here involved. Not only is there no relationship between the charge assessed against a particular pipeline and any specific service or benefit provided to that company, but, as pointed out, *supra* p. 18, each Class A or B pipeline is required to pay the general annual charge even though it has not been involved in any rate proceeding or matter before the Commission during the period involved. Obviously, the imposition of an annual charge in these circumstances does not involve averaging in the sense used in the *Aeronautical* case.

Likewise, in response to the urgings of the Congressional Appropriation Committees, the FCC has recently undertaken a revision of its fees and charges. See Amendment of Subpart G of Part 1 of the FCC's Rules Relating to the Schedule of Fees, FCC Docket No. 18802, 23 F.C.C. 2d 880 (1970); 28 F.C.C. 2d 139 (1971). The fees imposed in these proceedings with respect to CATV is the subpect of the litigation in *Clay Broadcasting Corporation* v. *F.C.C.* 464 F2d 1313 (5th Cir. 1972), pending on certiorari, *sub nom, National Cable Television Association Inc.* v. *U.S.*, Sup. Ct. No. 72-948.

In connection with this schedule of FCC fees, including particularly those relating to CATV, it should be noted that the FCC did not undertake to impose any charges to recoup any costs of rate regulation. Thus, the FCC annual charges involved in *National Cable* are unrelated to any rate regulatory responsibilities the FCC may have under the Federal Communications Act. Indeed, since CATV is not "common carrier" under Title II of the Communications Act. (*U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 172 (1968)), CATV operators apparently are "free to set their own advertising rates" *Cf. U.S.* v. *RCA*, 358 U.S. 334, 349 (1959).

Further, both the FCC and the Fifth Circuit recognized that Title V required special identifiable benefits to special beneficiaries. See *e.g.*, 23 FCC 2d at 890, 897-898, 28 FCC 2d at 142-143, 150-151; 464 F.2d at 1322. Thus, one of the primary purposes of FCC regulation of broadcasting and CATV activities appears to be to allocate the limited air waves and broadcast spectrum among its various users and to protect them from interference by others. See, *e.g.*,

U.S. v. *Southwestern Cable Co.*, 392 U.S. 157, (1968); *U.S.* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). As the Fifth Circuit specifically noted in upholding the validity of the annual fee imposed by the FCC upon the CATV operators, (464 F.2d at 1322):

> "It seems apparent to this court that under the Commission's regulatory scheme which existed from the time of the adoption of these fees until the present, CATV operators have received 'valuable benefits' sufficient to justify the imposition of the annual fee. Although the Commission does not issue licenses for CATV systems as it does for broadcast stations, CATV operators have directly benefited from the Commission's various regulations designed to keep entry into the industry open. (fn. omitted) The Commission has also proposed rules limiting the amount of franchise fees which local governments could charge cable operators. (fn. omitted). Indeed, as the Commission points out, the entire regulation of cable television is undergoing radical change, much of which clearly inures to the benefit of cable operators. (fn. omitted)
>
> "CATV operators in effect merchandise the broadcast signals which the Commission has authorized by its regulation. The scarcity of television outlets which exists under the Commission's regulation of the broadcast market structure creates much of the economic value of the distant signal importation by CATV. It is therefore clear the CATV operators do receive benefits of real value from the Commission's regulation of CATV and the related broadcast media."

Hence, since petitioner in that case basically is questioning not the thrust of Title V, but rather whether the members of the CATV industry received the requisite benefits justifying the imposition of the

fees assessed by the FCC (See Br. for Petitioner in No. 72-948, pp. 11-13), it is apparent that the views expressed by the Fifth Circuit and the parties in that proceeding are in no way inconsistent with the result reached by the court of appeals here.

4. Interstate Commerce Commission

The ICC has carefully avoided the imposition of any fees designed to recover generally the costs incurred by it in connection with its general rate regulation activities. Thus, in prescribing a schedule of fees in *Ex Parte No.* 246, "Regulations Governing Fees for Service Performed in Connection with Licensing and Related Activities," 326 I.C.C. 573 (1966), the ICC went out of its way to point out that the proposed fee schedule was limited to "our activities involving applications seeking certificates, permits, special permissions and other similar authorizations." (326 I.C.C. at 573). Further pointing out that the *Aeronautical* case "had the effect of approving a schedule of fees established by the FCC for filing applications for licenses, permits and benefits which have many characteristics in common with applications and similar matters being dealt with here," the ICC stressed that although it was proposing to charge certain fees in connection with the filing of tariffs, these fees had nothing to do with "normal tariff publishing activities" and was applicable "only [in] those instances where our specific approval is necessary to override a statutory requirement or an agency rule of general applicability." (*Id.* at 581).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should affirm the judgment of the Court of Appeals for the District of Columbia Circuit setting aside FPC Order No. 427 with respect to the imposition of a general annual charge and an added reserve fee upon natural gas pipeline companies subject to FPC regulation under the Natural Gas Act.

Respectfully submitted,

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September 19, 1973

APPENDIX

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

September 23, 1959 — CIRCULAR No. A-25

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User Charges

1. *Purpose.* Bureau of the Budget Bulletin No. 58-3 of November 13, 1957, set forth some general policies for developing an equitable and uniform system of charges for certain Government services and property. This Circular incorporates the policies contained in that Bulletin and gives further information with respect to: (a) the scope of user charge activities; (b) guidelines for carrying out the approved policies; and (c) agency submission of periodic status reports. It also prescribes Standard Form No. 4 on which periodic status reports are required.

Because this Circular applies also to the areas previously covered by Bureau of the Budget Circular No. A-28 of January 23, 1954, that Circular is hereby rescinded.

2. *Coverage.* Except for exclusions specifically made hereafter, the provisions of this Circular cover all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large. The specific exclusions which continue to be governed by separate policies are fringe benefits for military personnel and civilian employees; sale or disposal under approved programs of surplus property; postal rates; interest rates; and fee aspects of certain water resources projects (power, flood control, and irrigation). In addition this Circular does not apply to activities of the legislative and judicial branches, the municipal government of the District of Columbia, the Panama Canal Company or the Canal Zone Government.

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is ob-

secure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

b. *Lease or sale.* Where federally owned resources or property are leased or sold, a fair market value should be obtained. Charges are to be determined by the application of sound business management principles, and so far as practicable and feasible in accordance with comparable commercial practices. Charges need not be limited to the recovery of costs; they may produce net revenues to the Government.

4. *Agency responsibility.* The responsibility for the initiation, development, and adoption of schedules of charges and fees consistent with the policies in this Circular continues to rest with the agency. Each agency shall:

a. Identify the services or activities covered by this Circular;

b. Determine the extent of the special benefits provided;

c. Apply accepted cost accounting principles in determining costs;

d. Establish the charges; and

e. In determining the charges for the lease and sale of Government-owned resources or property, apply sound business management principles and comparable commercial practices.

5. *Cost, fees and receipts, and their determination.*

a. *Determination of costs.* Costs shall be determined or estimated from the best available records in the agency, and new cost accounting systems will not be established solely for this purpose. The cost computation shall cover the direct and indirect costs to

the Government of carrying out the activity, including but not limited to:

(1) Salaries, employee leave, travel expense, rent, cost of fee collection, postage, maintenance, operation and depreciation of buildings and equipment, and personnel costs other than direct salaries (e.g., retirement and employee insurance);

(2) A proportionate share of the agency's management and supervisory costs;

(3) A proportionate share of military pay and allowances, where applicable;

(4) The costs of enforcement, research, establishing standards, and regulation, to the extent they are determined by the agency head to be properly chargeable to the activity.

b. *Establishment of fees to recover costs.* Each agency shall establish fees in accordance with the policies and procedures herein set forth. The provisions of this Circular, however, are not to be construed in such a way as to reduce or eliminate fees and charges in effect on the date of its issuance. The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient. The cost of providing the service shall be reviewed every year and the fees adjusted as necessary. In establishing new fees and increasing existing fees the agency may make exceptions to the general policy (paragraph 3, above) under such conditions as illustrated below.

(1) The incremental cost of collecting the fees would be an unduly large part of the receipts from the activity.

(2) The furnishing of the service without charge is an appropriate courtesy to a foreign country or

international organization; or comparable fees are set on a reciprocal basis with a foreign country.

(3) The recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare.

(4) Payment of the full fee by a State, local government, or nonprofit group would not be in the interest of the program.

c. *Disposition of receipts.* Legislative proposals shall generally avoid disturbing the present rule that collections go into the general fund of the Treasury as miscellaneous receipts. However, execptions may be made where:

(1) It is intended that an agency or program or a specifically identifiable part of a program be operated on a substantially self-sustaining basis from receipts for services performed or from the sale of products or use of Government-owned resources or property.

(2) The agency can show that the initiation or increase of fees or charges is not feasible without earmarking of receipts.

(3) The receipts are in payment of the cost of authorized special benefits for which the demand is irregular or unpredictable, such as inspections performed upon request outside the regular duty hours.

This Circular is not intended to change the present system of sharing with States and counties receipts from the lease of certain lands and the sale of certain resources.

6. *Changes in existing law.* In cases where collection of fee and charges for services or property in accordance

with this Circular is limited or restricted by provisions of existing law, the agencies concerned will submit appropriate remedial legislative proposals to the Bureau of the Budget under the established clearance procedure, as provided in Bureau of the Budget Circular No. A-19.

7. *New activities.* In the establishment of new Federal activities which would provide special benefits, the agencies concerned are to apply the policies and criteria set forth in this Circular.

8. *Reports to the Bureau of the Budget.* Each agency shall make a report by December 31, 1959, for each bureau or comparable organizational unit, of the costs and charges for all services or property covered by this Circular, and shall also make a report of changes not later than December 31 of each succeeding year as a result of its annual review of such costs and charges. The initial report for any new agency hereafter established (including those established by reorganization) shall be submitted on December 31 following the end of the first fiscal year during which the agency was in operation. Each report shall cover the situation as of the preceding June 30, and shall be prepared in accordance with the instructions set forth in the attachments to this Circular.

By direction of the President:

MAURICE H. STANS
Director

Attachments

SUPREME COURT, U. S.

No. 72-1162

Supreme Court, U. S.
FILED
SEP 19 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

FEDERAL POWER COMMISSION, *Petitioner*,

v.

NEW ENGLAND POWER COMPANY, INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA

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INDEX

	Page
Questions Presented	2
Statement	2
A. The Legislative History of Title V and Its Implementation by the Bureau of the Budget	3
B. The Proceedings Before the Commission	6
C. The Decision Below	11
Summary of Argument	12
Argument	14
Title V of the Independent Offices Appropriation Act of 1952 does not authorize the Federal Power Commission to levy annual charges against natural gas pipeline companies to recoup the costs of regulatory activities under the Natural Gas Act which do not confer special benefits upon the pipeline companies	14
A. Title V of the Independent Offices Appropriation Act of 1952 permits the collection of fees by a federal agency for rendering specific services which confer special benefits upon identifiable recipients	18
B. The services whose costs the Commission seeks to recoup through the assessment of annual charges have not been shown to provide the natural gas pipeline industry with any special benefits	25
C. The decision of the court below simply restricts the Commission's assessment of fees and charges to the intent of Title V	38
Conclusion	41

Page

Appendix A, Section of H. Rep. No. 384, 82d Cong., 1st Sess. pertaining to Title V of the Independent Offices Appropriation Bill, 1952 ..... 1a

Appendix B, Statement of Congressman Yates in explanation of Title V of the Independent Offices Appropriation Bill, 1952 ..... 3a

Appendix C, Bureau of the Budget Circular No. A-25 dated September 23, 1959 ..... 6a

Appendix D, Notice of Proposed Rulemaking, Docket No. R-282, issued September 15, 1965, 30 F.R. 12077 ..... 15a

CITATIONS

CASES:

Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. 378 (1959) 13, 30, 33, 34

Clay Broadcasting Corp. v. *United States*, 464 F.2d 1313 (5th Cir. 1972), certiorari granted, May 14, 1973, *sub nom. National Cable Television Association, Inc.* v. *United States*, No. 72-948 40

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 13, 30, 35

Federal Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) 13, 28

Federal Power Commission v. *Sunray DX Oil Company*, 391 U.S. 9 (1968) 37

Federal Power Commission v. *Texaco Inc.*, 377 U.S. 33 (1964) 35

Fuels Research Council, Inc. v. *Federal Power Commission*, 374 F.2d 842 (7th Cir. 1967) 29, 30

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 26

Public Service Commission of New York v. *Federal Power Commission*, 327 F.2d 893 (D.C. Cir. 1964) 37

Public Service Commission of New York v. *Federal Power Commission*, 467 F.2d 361 (D.C. Cir. 1972) 29, 36

Page

Southern Louisiana Area Rate Cases, 428 F.2d 407 (5th Cir. 1970), certiorari denied *sub nom.* *Municipal Distributor Group* v. *Federal Power Commission*, 400 U.S. 950 29

Texas Gulf Coast Area Natural Gas Rate Cases, — U.S. App. D.C. —, No. 71-1828, decided August 24, 1973 .....26, 28, 29

Texas Gulf Coast Area Rate Proceeding, 45 FPC 674 (1971) 28

STATUTES AND REGULATIONS:

Federal Power Act, 16 U.S.C. 791a *et seq.* 11, 39
Section 10, 18 U.S.C. 803 .....14, 15

Independent Offices Appropriation Act, 1952, Title V, 65 Stat. 290, 31 U.S.C. 483a 2, 3, 4, 5, 8, 11, 13, 15, 18, 20, 32, 38, 39

Natural Gas Act 15 U.S.C. 717-717w 2, 3

Section 1(c), 15 U.S.C. 717(c) 38
Section 3, 15 U.S.C. 717b 38
Section 5(a), 15 U.S.C. 717d(a) 29
Section 7(a), 15 U.S.C. 717f(a) 39
Section 7(b), 15 U.S.C. 717f(b) 39
Section 7(c), 15 U.S.C. 717f(c) 2, 39
Section 7(e), 15 U.S.C. 717f(e) 39

18 C.F.R. 2.78 28
18 C.F.R. 2.75 .....37, 38
18 C.F.R. 159.1 38
18 C.F.R. 157.28(a) 37
Order No. 193, Docket No. R-155, 16 FPC 497 (1956).. 37
Order No. 317, Docket No. R-282, 35 FPC 30 (1966) as amended by Order No. 317-A, 35 FPC 392 (1966) 6, 9, 12, 15, 22, 32
Order No. 467, Docket No. R-469, issued January 8, 1973, as amended by Order No. 467-A, issued January 15, 1973, and by Order No. 467-B, issued March 2, 1973, 38 F.R. 1503, 2170, 6384 28

Page

MISCELLANEOUS:

Annual Report of Federal Power Commission for fiscal year 1972 ..... 16, 17, 39
Bureau of the Budget Circular No. A-25 (1953) 5, 20-21
Bureau of the Budget Circular No A-25 (1959) 5-6, 8, 23
97 Cong. Rec. 4809 (1951) 4-5, 20, 24
H.R. 3880, 82d Cong., 1st Sess. 4
H. Rep. No. 384, 82d Cong., 1st Sess. (1951) 4, 18, 19, 20
Notice of Proposed Rule Making Docket No. R-133, issued February 3, 1954, 19 F.R. 801 22
Notice of Proposed Rulemaking, Docket No. R-282, issued September 15, 1965, 30 F.R. 12077 ..... 10, 15-16, 32-33
Notice of Proposed Rulemaking, Docket No. R-380, issued January 23, 1970, 35 F.R. 4008 35
S. Rep. No. 2120, 81st Cong., 2d Sess. (1950) 20
S. Rep. No. 1467, 84th Cong., 2d Sess. (1956) 18, 21, 22

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v.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA

This brief is submitted by respondent, Independent Natural Gas Association of America (INGAA), in answer to the brief of petitioner, Federal Power Commission (Commission). INGAA is a non-profit trade association representing virtually all of the major natural gas pipeline companies of the United

States, all of which are subject to the jurisdiction of the Commission under the Natural Gas Act, 15 U.S.C. 717-717w. As it did in the Court of Appeals, INGAA will address itself to the Commission's Order No. 427 and the denial of rehearing (A. 87-114, 144-152) as they affect natural gas pipeline companies subject to the Commission's jurisdiction. This review involves only the power of the Commission to assess the annual charges prescribed by Order No. 427 and not the manner or reasonableness of the exercise of such power. INGAA did not challenge the validity of the fees assessed under Order No. 427 in connection with applications of pipelines for certificates of public convenience and necessity involving construction or acquisition of facilities, 15 U.S.C. 717f(c).

QUESTIONS PRESENTED

1. Whether Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) authorizes the Commission to impose upon natural gas pipeline companies annual charges to reimburse the United States for the Commission's cost of administering pipeline rate and accounting matters which do not benefit the pipelines.

2. Whether Title V permits the Commission to impose upon pipelines annual assessments to recoup the costs incurred in processing independent producers' certificate applications for authority to sell natural gas in interstate commerce.

STATEMENT

This case involves the imposition of substantial annual charges by the Commission upon electric public utilities and natural gas pipeline companies subject

to its jurisdiction. The purpose of these annual charges is stated by the Commission to be for the recoupment of its costs for the following regulatory activities (Br. p. 16):

> "(1) the producer certificate program; (2) pipeline rate regulation; and (3) the electric utility reliability and coordination programs. In addition, the portion of the costs of the Commission's pipeline regulation programs (other than rate regulation) and electric utility regulation programs which is not recouped from filing fees will be included in the annual assessments."

The Commission asserts that these annual charges are authorized by Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 31 U.S.C. 483a. The United States Court of Appeals for the District of Columbia Circuit, in its opinion below, held to the contrary.

As stated above, INGAA addresses itself to the Commission's adoption of its Order No. 427 insofar as it imposes annual charges upon natural gas pipeline companies subject to its jurisdiction under the Natural Gas Act, other than the increased fees related to pipeline certificate applications which are not challenged.

A. The Legislative History of Title V and Its Implementation by the Bureau of the Budget

The Naural Gas Act contains no provision authorizing the Commission to impose fees or charges for the performance of the regulatory activities delegated to it by Congress. Such authority as it may have in this area can be derived only from Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 31 U.S.C. 483a.

Title V authorizes federal agencies to prescribe fair and equitable fees for "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued" by such agencies to or for any person, except those engaged in the transaction of official business of the Government. The stated purpose of such fees is to render these services "self-sustaining to the full extent possible." Title V also provides that any fees prescribed shall be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts."

Title V was inserted in an appropriations bill by the House Committee on Appropriations, H.R. 3880, 82d Cong., 1st Sess., p. 60. It reflected the concern of that Committee that "special beneficiaries" of services provided by federal agencies were not being adequately assessed for such services. Thus, in reporting out H.R. 3880, the Committee stated in pertinent part, H. Rep. No. 384, 82d Cong., 1st Sess., p.2:

> "The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries."[1]

On the floor of Congress, Title V was discussed by Congressman Yates, an Appropriations Committee member and one of its sponsors, 97 Cong. Rec. 4809

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[1] The section of the Committee's Report entitled "Fees and Charges" is set out *in toto* in App. A, *infra*, pp. 1a-2a.

(1951).[2] He alluded to the growing complexity of problems confronting federal regulatory agencies and the resultant need for increased appropriations. In amplification, he took particular note of the services rendered to applicants for certificates and licenses by the Federal Communications Commission and the Interstate Commerce Commission. Essentially, Congressman Yates described Title V as a means to permit federal agencies to recoup "some of the costs" incurred by them particularly in the processing of applications for licenses, franchises and certificates through the establishment of fee schedules. Title V was enacted precisely as reported out by the House Appropriations Committee, 65 Stat. 290, 31 U.S.C. 483a.

Title V expressly provides for its implementation by the President of the United States. In the case of fee regulations by agencies in the executive branch, it provides that such regulations "shall be as uniform as practicable and subject to such policies as the President may prescribe." By direction of the President, the Bureau of the Budget (now Office of Management and Budget) first issued Budget Circular No. A-25, dated November 5, 1953. Budget Circular No. A-25 was subsequently revised and reissued under date of September 23, 1959 and is still in full force and effect.[3]

The general policy enunciated by the current Budget Circular A-25 in accordance with the terms of Title V is that "[a] reasonable charge, as described

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[2] Congressman Yates' discussion of Title V is set out in its entirety in App. B, *infra*, pp. 3a-5a.

[3] The Commission states that it has relied on Budget Circular No. A-25 of September 23, 1959 (A. 7, 93). This Circular is attached hereto as App. C, *infra*, pp. 6a-14a.

below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit" (App. C, *infra*, p. 7a). It further states that if such "service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service" (*id.* at p. 7a). However, Budget Circular A-25 states that no charge should be imposed for services rendered "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public" (*id.* at p. 8a).

B. The Proceedings Before the Commission

By its Notice of Proposed Rulemaking issued November 25, 1970, the Commission proposed for the first time to impose two types of annual charges upon natural gas pipeline companies (A.15-16). It also proposed to increase its existing fees covering the processing of applications by pipeline companies for certificates of public convenience and necessity involving the construction and acquisition of pipeline facilities in order to maintain its pipeline certificate program on a "self-sustaining" basis (A. 5).[4]

[4] The pipeline certificate fees, which have not been the subject of challenge, were originally established in 1966 by the Commission's Order No. 317, 35 FPC 30 (1966). At that time, the Commission made clear that it was attempting to make its pipeline certificate processing function self-sustaining and recognized the possibility that an increase in processing costs might necessitate increased fees, 35 FPC at 32. The increase in these fees prescribed by Order No. 427 is not in issue here.

The first annual charge, hereinafter referred to as the annual general charge, would recoup "the costs of administration of the natural gas pipeline programs" conducted by the Commission (A. 15). The Commission explained the purpose of the annual general charge, stating:

> "The remaining costs of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings . . ." (A. 5)

The Commission proposed that the total annual general charge designed to recoup its costs of pipeline rate regulation would be allocated to each Class A and Class B pipeline company in the proportion that each company's total gas deliveries bear to the total gas deliveries of all Class A and Class B companies (A. 16).

In addition, the Commission proposed a second annual charge, hereinafter referred to as the reserves added assessment, to be assessed against those pipeline companies required to file an Annual Report — Total Gas Supply on FPC Form No. 15. This assessment upon each pipeline company was to be one-tenth of a mill for each Mcf[5] of new reserves of natural gas certificated during the year, as shown on the particular company's FPC Form No. 15 (A. 16). The purpose of the proposed reserves added assessment is to recoup the Commission's cost of processing the certificate applications of independent producers seeking authorization to sell natural gas. The Commission noted that — for reasons of "administrative con-

[5] An Mcf is the equivalent of 1,000 cubic feet of gas.

venience" — it was imposing the costs of the producer certificate program not upon the producers but upon the pipeline companies (A. 5).

In its Notice of Proposed Rulemaking, the Commission relied upon Title V of the Independent Offices Appropriation Act of 1952 and Bureau of the Budget Circular No. A-25 dated September 23, 1959 as authority for the increased certificate application fees as well as the two annual charges (A. 4). The notice provided that any interested persons could submit written comments on the proposed rulemaking and should indicate whether a conference at the Commission was desired to discuss the proposed amendments (A. 1). INGAA and others requested such a conference, but the requests were not granted (A. 83, 145). Obviously, no hearing was held on the proposed rulemaking.

Following the submission of written comments by interested persons, the Commission issued its Order No. 427 on March 18, 1971 promulgating its rule substantially as proposed (A. 87-114).[6] INGAA and others objected to the two annual charges levied against pipeline companies to pay for the Commission's costs of pipeline rate regulation and its producer certificate program as being beyond the authority conferred by Title V.

In its Order No. 427, the Commission sought to justify the annual general charge within the meaning of Title V as implemented by Circular A-25, but it conceded that its regulation of pipeline rates "has provided continuing benefits to consumers." Never-

[6] Order No. 427 made certain modifications in the proposed rule. However, these are not material for present purposes.

theless, it insisted that this activity had benefitted the pipelines "by creating the economic climate for greater usage" of their services (A. 97).[7]

On rehearing of Opinion No. 427, the Commission was referred to its first schedule of fees adopted in 1966 which was also issued in reliance upon Title V and Circular A-25.[8] That fee schedule consisted of filing and processing fees for specific applications seeking specific authorizations under the Natural Gas Act. Before promulgating this schedule, the Commission carefully considered the validity of imposing charges upon pipeline companies to recoup the cost of its pipeline rate and accounting regulation under the Natural Gas Act as well as for recovering its costs relating to independent producer certificate matters.

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[7] Commissioner Carver dissented to that part of Order No. 427 which prescribed the annual charges here complained of, stating that in his view regulation in the public interest is "conducted for the benefit of the general public; it ought to be financed out of the general fund of the Treasury in the same manner as other governmental functions" (A. 113). He concluded as follows (A. 114):

> "To the extent that Part 36 [the counterpart of Part 159.2a], added to our regulations by this order, attempts to recover administrative costs above and beyond those that have direct relation to a service rendered or privilege enjoyed (such as an annual charge on some *ad valorem* basis), it ceases to qualify as an authorized regulation establishing a fee structure. It is based on revenue requirements, rather than costs incurred or value received, and as such is more accurately defined as levying a tax. I find nothing in either the Federal Power Act or the Natural Gas Act, nor in Title V, Independent Offices Appropriation Act, 1952, which permits or requires us to levy and collect taxes.
>
> "The levy of an annual fee as a revenue measure is objectionable as bad public policy and is not legally sound."

[8] Order Nos. 317 and 317-A, 35 FPC 30, 392 (1966). Order No. 317 is entitled "Establishing Fees for Applications Filed With the Commission."

Acting in reliance upon Title V and Circular A-25, the Commission conceded its lack of authority to impose annual general charges comparable to the ones in issue now.

In the Notice of Proposed Rulemaking issued September 15, 1965, Docket No. R-282 (30 F. R. 12077),[9] resulting in the promulgation of its first fee schedule in Order No. 317, the Commission stated:

> "The regulatory activities of the Federal Power Commission convey special benefits to identifiable recipients above and beyond those which accrue to the public at large. Congress has adopted the policy that the recipient of special benefits conveyed by a Federal agency program should pay a reasonable charge to defray the cost of the program and to relieve the general taxpayer who bears the major burden of supporting Federal agencies. The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies. The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons." (App. D, *infra*, p. 16a).

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[9] App. D, *infra*, pp. 15a-21a.

In its order issued May 14, 1971 denying rehearing of Order No. 427 (A. 144-152), the Commission brushed aside the above-quoted language as dicta even though Title V and Circular A-25 have remained unchanged since the Commission issued its first fee schedule (A. 148-149). The Commission reiterated its generalized view that the annual general charge meets the standards of Title V since it is "predicated on the benefits accorded . . . natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress" (A. 149).[10]

C. The Decision Below

On petitions for review, the Court of Appeals set aside the annual general charge and the annual reserves added assessment imposed upon pipeline companies by Order No. 427 (Pet. App. 1a-13a).[11] Determining that Title V allowed the Commission "to recoup costs from identifiable 'special beneficiaries' where the services rendered inured to the benefit of special recipients not the general public", the court concluded that these annual charges could

[10] In the same order, the Commission undertook for the first time to justify the imposition of the annual reserves added assessment upon pipeline companies on grounds other than administrative convenience (A. 149). This belated justification also constitutes an about-face by the Commission from its first rulemaking proceeding relating to specific fee assessments under the Natural Gas Act (App. D, *infra*, p. 16a). Commissioner Carver again dissented on the same grounds as stated with respect to the original order (A. 152).

[11] The Court of Appeals also set aside the annual charges assessed against public utilities to recoup costs of administering Parts II and III of the Federal Power Act, 16 U.S.C. 824 *et seq.* This aspect of the court's decision will be addressed by New England Power Company, a respondent herein.

not be imposed since their purpose is to recoup costs incurred in "the administration of programs benefitting the general public" (Pet. App. 7a, 10a). Regarding the annual general charge, the court "wholeheartedly" concurred with the position first taken by the Commission in 1966 that charges or fees designed to recover the costs of rate and accounting regulation of natural gas pipeline companies were inappropriate since these activities are primarily for the benefit of the general public rather than the regulated companies (Pet. App. 10a).

SUMMARY OF ARGUMENT

The Natural Gas Act confers no authority upon the Commission to assess fees and charges upon natural gas pipelines. Any such authority which it may have can only be derived from Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 31 U.S.C. 483a. As the court below correctly held, Title V does not authorize the Commission to assess charges for the recoupment of the costs of its regulatory activities which do not confer special benefits upon the pipeline companies. The Commission ruled to this same effect in its order issued in 1966 when it first prescribed a fee schedule for pipelines (35 FPC 30). And the court below agreed with the Commission's first interpretation of the limited powers conferred upon it by Title V to assess fees and charges. The Commission has recently recommended to Congress that the Natural Gas Act be amended to grant the Commission specific authority to assess charges sufficient to make its activities self-sustaining to the full extent possible.

Title V and Circular A-25 limit the Commission's assessments of fees and charges to those designed to

recoup the costs of the Commission's services from which the pipelines derive a special benefit. This interpretation is supported by the legislative history of Title V. There is no justification in either Title V or Circular A-25 for the assessment of the costs incurred by the Commission in connection with its rate and accounting activities on an industry-wide basis. As stated by the court below, "only Congress can give authority to levy these fees" and it "has not done so here" (Pet. App. 10a).

In support of its contention that its charges are valid, the Commission alleges that its activities are of benefit overall to the pipeline industry. The fact of the matter is that its rate and accounting regulation are deterrents to the pipelines and whatever benefits flow therefrom redound to the ultimate consumers and the general public for whose benefit the Natural Gas Act was enacted. *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U.S. 591 (1944); *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959).

The Commission's claims that it has provided financial stability for the pipeline industry by its various activities and has taken steps to increase supplies of natural gas are totally lacking in any support. As this Court is aware, the pipeline industry is now in the throes of a critical gas shortage. *Federal Power Commission* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972).

The Commission's other claims in purported justification of its action in charging the pipelines for the costs incurred in connection with independent producer activities are also without support. Whatever

benefits are provided by the independent producer certificate regulation redound only to the benefit of the producers and the ultimate consumers.

The decision below does not result in "virtual nullification" of Title V as contended by the Commission. The Commission is collecting substantial fees in connection with pipeline certificate matters which have not been challenged. It is also collecting substantial amounts charged licensees under Section 10 of the Federal Power Act, 16 U.S.C. 803, as specifically authorized by Congress.

ARGUMENT

TITLE V OF THE INDEPENDENT OFFICES APPROPRIATION ACT OF 1952 DOES NOT AUTHORIZE THE FEDERAL POWER COMMISSION TO LEVY ANNUAL CHARGES AGAINST NATURAL GAS PIPELINE COMPANIES TO RECOUP THE COSTS OF REGULATORY ACTIVITIES UNDER THE NATURAL GAS ACT WHICH DO NOT CONFER SPECIAL BENEFITS UPON THE PIPELINE COMPANIES.

The Commission argues in support of its contentions that the court below erred in setting aside Order No. 427 with respect to the annual charges since (Br. pp. 12-13):

(1) Title V refers to "groups" as well as individual special beneficiaries and, consequently, Title V applies where "the group specially benefited consists of the entire membership of an industry."

(2) The services whose costs will be supported by the Commission's annual fees provide special benefits to the natural gas and electric utility industries above and beyond those which accrue

from such services to the general public. The alleged benefits are stated to be:

(a) "a favorable economic climate in which they have grown and prospered;"

(b) "stabilization of rates and supply in both industries;" and

(c) the enhancement of "public confidence in and demand for their products, as against competing sources of fuel and energy."

(3) The fact that the Commission's activities are conducted primarily for the benefit of the general public does not make the assessment of charges for these activities inappropriate under Title V.

Title V was enacted on August 31, 1951, 65 Stat. 290, 31 U.S.C. 483a. It was not until over fourteen years later, on January 5, 1966, that the Commission by its Order No. 317 entitled "Establishing Fees for Applications Filed with the Commission" first imposed any fees upon companies subject to its jurisdiction, other than those specifically authorized under Section 10 of Part I of the Federal Power Act, 16 U.S.C. 803. Order No. 317 prescribed fees "relating to applications by natural gas pipeline companies for certificates of public convenience and necessity as well as applications for exemptions under section 1(c) of the Natural Gas Act, for export or import authority, for an order directing a pipeline company to serve a local distributor or for abandonment authority" (35 FPC 30).

In its notice of rulemaking quoted above, and which culminated in the promulgation of Order No.

317, the Commission *sua sponte* determined that the types of annual charges prescribed by Order No. 427 would not be appropriate since the services involved are "primarily for the benefit of the general public rather than the regulated companies." It was this finding with which the court below concurred (Pet. App. 10a). The court below is correct and its opinion should be affirmed.

It is clear that the Commission, in adopting Order No. 427, was motivated more by the pressures applied by "Congressional appropriation committees" and Members of Congress than it was by its more considered views of its powers to impose fees and charges under Title V (A. 93). Not only is this shown by the language of Order No. 427, but also by the Commission's Annual Report to the Congress for the fiscal year 1972. It is there stated with respect to the basis for the Commission's promulgation of Order No. 427 as follows (p. 8):

> ". . . on March 18, 1971, the Commission at the repeated request of congressional appropriation committees adopted an order providing for the charging of fees in connection with the filing and processing of applications under Parts II and III of the Federal Power Act and the imposition of annual charges upon public utilities and natural gas pipeline companies under the Federal Power and Natural Gas Acts to reimburse the United States for the costs of administration of those statutes. However, the United States Court of Appeals for the District of Columbia in *New England Power Company, et al.* v. *FPC,* on August 15, 1972, 467 F. 2d 425, held that the Commission did not have the authority to impose an-

> nual charges (the question of filing fees was not in dispute)."

The Commission recommended to the Congress in order to extricate it from this current inability to impose annual charges upon the companies subject to its jurisdiction, that it enact legislation specifically providing the Commission with such powers. Such recommendation was stated as follows (p. 8):

> "In the light of the views expressed by the Committees and by Congressional statute that Government agencies should 'be self-sustaining to the full extent possible,' statutory clarification of the authority of governmental agencies to assess fees as well as annual charges is highly desirable."

As we shall show, Title V does not authorize the action taken by the Commission. By its Order No. 427, the Commission states that the annual charges imposed upon natural gas pipeline companies will "reimburse the United States for costs of administration of the Natural Gas Act" (A. 109). There are two types of annual charges in question. First is the annual general charge which recoups from pipeline companies the cost incurred by the Commission in carrying out its function of regulating pipeline rates under the Natural Gas Act. Second is the annual reserves added assessment by which pipeline companies bear the burden of the costs incurred by the Commission in processing certificate applications filed by the independent producers of natural gas. Both were set aside by the Court of Appeals.

Although the Commission states that the two annual charges will accomplish the above objectives, it adds that the annual general charge will also recoup such costs of the pipeline regulation programs, other than

rate regulation, which are not recovered by its increased certificate filing fees (Br. p. 16). The Commission has nowhere described these residual costs. On the other hand, the Commission has made clear that the increase in its pipeline certificate filing fees is designed to make its pipeline certificate program "self-sustaining" (A. 5).

As discussed below, the legislative history of Title V is not extensive, but it is more than sufficient to make its purpose clear.[12] Thus, in its report on TitleV, the House Appropriations Committee expressed concern that "the Government is not receiving full return from many of the services which it renders to special beneficiaries" H. Rep. No. 384, 82d Cong., 1st Sess., p. 2 (1951). Accordingly, Title V authorizes federal agencies to charge any person for designated services rendered and benefits conferred in order to make that service or benefit as self-sustaining as possible.

A. Title V of the Independent Offices Appropriation Act of 1952 Permits the Collection of Fees by a Federal Agency for Rendering Specific Services Which Confer Special Benefits upon Identifiable Recipients.

Title V provides, in pertinent part, that

> "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person (including groups, as-

[12] Title V has been characterized by the Senate Committee on Government Operations as a rider to the Independent Offices Appropriation Act of 1952, see S. Rep. No. 1467, 84th Cong., 2d Sess., p. 19 (1956).

> sociations, organizations, partnerships, corporations, or businesses), . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . ."

In its report, the House Appropriations Committee explained the purpose of Title V as follows, H. Rep. No. 384, 82d Cong., 1st Sess., pp. 2-3:

> "The Committee is concerned that the Government is not receiving full return from many of *the services which it renders to special beneficiaries.* Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and other related considerations." (emphasis supplied).

There was virtually no debate on the floors of Congress concerning Title V. However, Congressman Yates, a member of the Appropriations Committee, discussed in some detail examples of the kind of services rendered by federal agencies to which Title V is directed. In the main, he discussed those agency services related to the processing of applications for li-

censes and certificates of convenience and necessity, 97 Cong. Rec. 4809 (1951).[13]

As the foregoing legislative history makes apparent, the intent of Title V was to encourage federal agencies to charge identifiable "special beneficiaries" for the costs incurred by the agency in providing the special benefits received. Plainly, Title V was not a revenue-raising measure designed to make all activities of a given federal agency self-sustaining.[14] Rather, Title V's purpose was only to authorize federal agencies to make those of its activities which bestow special benefits upon identifiable recipients as self-sustaining as possible through fee assessments.

This interpretation of Title V is fully supported by its implementation of it by the Bureau of the Budget (now Office of Management and Budget).[15] On November 5, 1953, the Budget Bureau issued its first Circular

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[13] App. B, *infra*, pp. 3a-4a.

[14] In its report on Title V, the House committee referred generally to other Congressional committees which were also engaged in studying the question of agency fee assessments for special services rendered, H. Rep. No. 384, 82d Cong., 1st Sess., p. 2. One of those was the Senate Committee on Expenditures in the Executive Departments whose report was issued in 1950, S. Rep. No. 2120, 81st Cong., 2d Sess. In its report (at p. 1) the Senate committee stated its purpose:

> ". . . The committee's approach, therefore, is not from a revenue-raising perspective, but is rather with the view of determining the feasibility of offsetting items now necessarily included in the Federal budget as non-reimbursable by transferring the financial burden thereof to the special beneficiaries . . ."

[15] As previously indicated, Title V provides that among the agencies in the executive branch, fee regulations "shall be as uniform as practicable and subject to such policies as the President may prescribe". This contemplated implementation of Title V was delegated to the Bureau of the Budget by the President.

A-25 under Title V entitled "Fees for licensing, registration, and related activities" to the heads of executive departments and establishments. Although now superseded, the coverage of the 1953 Circular A-25 [16] is worthy of note. It provided as follows:

> "This Circular covers the processing of applications for and the issuance, renewal, modification, transfer, or termination of any license, permit, certificate, charter, registration, exemption, or similar form of authorization granted or otherwise provided by Federal agencies . . ."

In explanation of the above-quoted language, the 1953 Circular made specific reference to the types of agency activities covered.[17] The only activity of the Federal Power Commission explicitly covered was the issuance

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[16] This Circular may be found in its entirety as Appendix A to S. Rep. No. 1467, 84th Cong., 2d Sess., pp. 244-46 (1956).

[17] The 1953 Circular stated in this regard:

> "Subject to the determination of any question as to the legal authority for establishing or raising fees (see paragraph 6), types of activities covered by the Circular include, but are not limited to, the following:
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> Certificates of public convenience and necessity issued by the Civil Aeronautics Board, the Interstate Commerce Commission, the Federal Communications Commission, and the Federal Power Commission;
>
> Patents granted and trademarks registered by the Patent Office of the Department of Commerce;
>
> Radio operators licenses and radio station licenses issued by the Federal Communications Commission;
>
> Registrations, conditional exemptions from registration, and qualifications filed with the Securities and Exchange Commission;
>
> Visas, passports, and similar permits issued by the Department of State;

(Footnote continued on next page)

of certificates of public convenience and necessity under the Natural Gas Act. In 1954, the Commission issued its first notice of rulemaking concerning fee assessments in reliance upon Title V and the 1953 Budget Circular.[18] By its 1954 notice, the Commission proposed fees for the filing and processing of certificate applications and export and import applications under the Natural Gas Act. However, this proposed rule was never promulgated by the Commission because of adverse Congressional reaction to Title V. See: S. Rep. No. 1467, 84th Cong., 2d Sess., pp. 9-11, 208 (1956).

It was not until 1966 that the Commission adopted its first fee schedule in reliance upon Title V and Circular A-25, dated September 23, 1959, Order No. 317, Docket No. R-282, 35 FPC 30 (1966).[19] As previously indicated, the Commission's fee schedule was deliberately limited to filing fees for various specific authorizations sought by application under the Natural Gas Act as well as a graduated processing fee for pipeline certificate applications thereunder.[20]

Airman certificates issued by the Civil Aeronautics Administration;

Vessel inspection certificates issued by the Coast Guard;

Certificates issued under the Pure Food and Drug Act; and

Licenses to classify, grade, or weigh agricultural products, issued by the Department of Agriculture."

[18] Notice of Proposed Rule Making dated February 3, 1954, Docket No. R-133, 19 F.R. 801.

[19] The 1959 Budget Circular is the current implementation of Title V upon which the Commission also relied in its Order No. 427, here in issue.

[20] The Commission at that time refused to impose user charges similar to the annual general charge in issue here, holding that its rate and accounting activities "are primarily for the benefit of the general public rather than the regulated companies" (App. D, *infra*, p. 16a).

Here, the Commission also asserts that in devising annual charges, it has "endeavored to adhere to the guidelines contained in Budget Circular No. A-25" of September 23, 1959 (A. 7, 93).

Circular A-25 states as a matter of general policy that a reasonable charge "should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit" (App. C, *infra*, p. 7a). It also provides that if such "service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service" (App. C, *infra*, p. 7a). The Budget Circular then describes three circumstances where a special benefit will be considered to accrue to an identifiable recipient for which a charge should be made. In defending the two annual charges imposed upon the pipeline companies, the Commission relied (Br. p. 17) upon the circumstance where the Government-rendered service, in the words of the 1959 Budget Circular,

> "[p]rovides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft)."[21]

In implementing Title V by its Circulars, it is indisputable that the Bureau of the Budget was and is obliged to remain within the ambit of the Congressional intent behind Title V. As we have shown, Congress' intent was that fees should only be imposed upon "spe-

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[21] App. C, *infra*, p. 7a.

cial beneficiaries" of agency-rendered services and one of the principal services discussed by Congressman Yates, a sponsor of Title V, pertained to an agency's processing of applications for franchises, permits and certificates of public convenience and necessity. On the floor of the House, he stressed the great value conferred upon successful applicants for such licenses and certificates.[22] Consequently, when the Budget Bureau cites certificates of necessity and convenience and safety inspections of craft as examples of a Government-rendered service which "provides business stability or assures public confidence in the business activity of the beneficiary", the choice of examples should be considered highly significant. Yet, the Commission at no point alludes to the Budget Bureau's examples, nor does it attempt to discuss the strong probability that, consonant with the purpose of Title V, the Budget Bureau's examples were intended to limit the meaning to be attributed to the Bureau's broad phrases "business stability" and "public confidence."

Nowhere in Title V or Budget Circular A-25 is there any rational basis to justify the Commission's contention that whatever benefits accrue to the pipeline industry from its rate and accounting activities justifies the assessment of those costs on an industry-wide basis. The court below correctly held that such assessments were beyond the Commission's powers, stating (Pet. App. 10a):

> ". . . In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the

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[22] Congressman Yates also discussed the safety inspections of locomotives by the Interstate Commerce Commission as an example of an agency service which confers a special benefit for which a fee would be appropriate, 97 Cong. Rec. 4809 (1951).

> general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here."

The court's decision below is clearly correct. The Commission is currently availing itself of its true course of relief by seeking the appropriate statutory authority from Congress.

B. The Services Whose Costs the Commission Seeks To Recoup Through the Assessment of Annual Charges Have Not Been Shown To Provide the Natural Gas Pipeline Industry with Any Special Benefits.

In an effort to substantiate its annual charges, the Commission states that the regulatory activities to be supported by such charges are of "benefit overall to the members of both" the public utility and natural gas pipeline industries (A. 94). In reliance upon "a publication issued by a prominent member of the New York Stock Exchange", the Commission concluded that the exercise of the powers delegated to it by Congress has "provided the foundation for the sound financial condition which public utilities and natural gas companies have achieved" (A. 97). Upon this same predicate, the Commission further concluded that "our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands" (A. 97-98). Upon the basis of these conclusory statements in its Order No. 427, and

without more, the Commission found that the annual charges assessed would be "equitable" (A. 98).

The Commission's brief in this Court attempts to bolster its assertions in Order No. 427 with its allegations that the Commission's rate and accounting activities in addition to benefitting the general public "also provide special benefits to the companies subject to the Commission's jurisdiction, above and beyond those accruing to the public" (Br. p. 16). The Commission alleges in its brief that its efforts to

> ". . . assure a more stable supply of natural gas, coupled with the Commission's regulation of pipeline rates to keep them at a just and reasonable level, have added to the competitive appeal of natural gas in the overall fuel market and thereby have encouraged consumers to invest in facilities for the use of gas" (Br. p. 19).

Because of these alleged benefits to the pipelines, the Commission states that it is therefore justified in assessing against the pipelines its costs for: (1) "the producer certificate program" and (2) "pipeline rate regulation" (Br. p. 16).

These purported justifications for Order No. 427 do not provide the requisite explanations required to justify the Commission's conclusions.[23] The decision of this Court in *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968) states with respect to the prerequisite for the Commission's orders to withstand judicial review as follows (*id.* at 792):

> "Judicial review of the Commission's orders will therefore function accurately and efficaciously

[23] *Texas Gulf Coast Area Natural Gas Rate Cases,* No. 71-1828, decided by the United States Court of Appeals for the District of Columbia Circuit on August 24, 1973 (Slip Op. p. 61).

only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry."

The difficulty with the Commission's Order No. 427 is that the Commission is attempting to assign benefits to the pipelines which accrue only to the independent producers and to the general public. In large measure the alleged benefits are, in fact, deterrents to the pipelines. We shall review briefly what these alleged benefits to the pipelines are.

First, with respect to the Commission's conclusion that the exercise of the powers delegated to it by Congress has "provided the foundation for the sound financial condition which public utilities and natural gas companies have achieved" (A. 97), the only basis for this conclusion is a footnote reference in Order No. 427 to a report issued by the Commission "in 1950 [which] discussed industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system" for public utilities and licensees (A. 97). The only other references in the footnote are to a "publication issued by a prominent member of the New York Stock Exchange" and to some editorial comment found in a "trade publication."[24]

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[24] The Commission's report referred to is entitled *"Report on the Reclassification and Original Cost of Electric Plant of Public Utilities and Licensees,* Federal Power Commission, 1950, pp. 19-20." It will be noted that this report is addressed to "Public Utilities and Licensees"—not pipelines.

No real basis is given to support this conclusion concerning the financial condition of the pipelines. The fact is as discussed below, and as this Court has noted, that the natural gas pipeline industry is in the throes of a crisis caused by the critical gas shortage. The Commission has itself indicated that the early field prices which it fixed did not bring forth adequate supplies of natural gas.[25]

The contention of the Commission (Br. pp. 18-19) that special steps taken to increase the interstate flow of natural gas during periods of shortage and the regulation of pipeline rates "have added to the competitive appeal of natural gas in the overall fuel market" is a myth. A Staff Report released by the Commission on July 16, 1973, shows that numerous pipelines have been required to curtail vast volumes of deliveries under firm commitments and that such curtailments will be very substantially increased in the future. In recognition of this critical period of gas shortages, the Commission has issued a Policy Statement prescribing curtailment procedures for pipelines subject to its jurisdiction by its Order No. 467 entitled "Utilization and Conservation of Natural Resources—Natural Gas Act", Docket No. R-469, issued January 8, 1973, as amended on January 15, 1973 and March 2, 1973 (18 C.F.R. 2.78; 38 F.R. 1503, 2170, 6384).[26]

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[25] *Texas Gulf Coast Area Rate Proceeding*, 45 FPC 674 at 686 (1971) and *Texas Gulf Coast Area Natural Gas Rate Cases*, — U.S. App. D.C. — decided August 24, 1973 (Slip Op. pp. 43, 110).

[26] In its Opinion in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) this Court commented on the "temporary and chronic natural gas shortages throughout the Nation" (at 626). Also throughout the Decision of the United States Court of Appeals for the District of Columbia in *Texas Gulf*

In support of its contention, the Commission cites *Fuels Research Council, Inc.* v. *Federal Power Commission,* 374 F.2d 842 (7th Cir. 1967). This decision does not support the Commission's conclusions. The case was an outgrowth of a condition in a certificate issued in 1959 to Midwestern Gas Transmission Company (Midwestern) in which the Commission tentatively accepted proposed rate schedules for sales to the distribution companies but directed the pipeline to file a new rate schedule within one month after the first year of operation which Midwestern did. A rate investigation was instituted by the Commission under Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), concerning the Midwestern filing which was consolidated with a similar investigation instituted against Natural Gas Pipeline Company of America. Both companies serve generally the same areas.

That case involved markets for the sale of fuel for interruptible industrial boiler uses. The contest was actually between coal interests (three coal associations and a labor union) and the gas distributors. The coal interests contended that the pipeline rates approved by the Commission were artifically contrived, rather than based upon proper allocations of cost, to enable the distributors to block out the coal interests from the interruptible industrial boiler fuel market (*id.* at 849).

Aside from the fact that the Commission has now made a complete about-face and is discouraging inter-

Coast Area Natural Gas Cases, — U.S. App. D.C. —, decided August 24, 1973, the court makes recurrent references to the gas shortage. See also: *Southern Louisiana Area Rate Cases,* 428 F. 2d 407, 437 (5th Cir. 1970); *cert. den., Municipal Distributor Group* v. *Federal Power Commission,* 400 U.S. 950; *Public Service Commission of New York* v. *Federal Power Commission,* 467 F. 2d 361, 362 (D.C. Cir. 1972).

ruptible industrial boiler fuel sales during this period of critical gas shortages, it is readily apparent that it was the distributors and the ultimate consumers who were the beneficiaries of the Commission's approval of the contested rate designs.

The *Fuels Research Council* case simply highlights the purpose of the Commission's rate review functions under the Natural Gas Act and demonstrates the invalidity of the Commission's attempt to recoup its costs of pipeline rate regulation by means of the annual general charge imposed upon the pipelines. As the court below noted (Pet. App. 9a, n. 10), this Court has made clear that the primary beneficiaries of the Natural Gas Act are not the pipelines but rather the ultimate consumers of natural gas. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610-12 (1944); *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388-89 (1959). In *Hope*, the Court observed that the fixing of just and reasonable rates was "the heart of the new regulatory system" established by the Natural Gas Act (*id.* at 611). The Court in *Hope* held that the rate provisions of the Act "were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies" (*id.* at 612).

In relying upon Title V and Circular A-25 as support for imposing the annual general charge upon pipeline companies to recoup the costs of regulating their rates, the Commission has wholly ignored the nature and purpose of its rate review functions under the Natural Gas Act.[27] Those functions are necessarily

[27] In this regard, it is noteworthy that the Commission has not sought to recoup its costs of producer rate regulation from the producers.

performed for the special benefit of the general public, the natural gas consumers of this nation.

Similarly, the reserves added assessment imposed upon the pipelines to recoup the Commission's costs of producer certificate regulation clearly contravenes Title V and the implementing criteria of Circular A-25. The Commission's present defense of this particular assessment upon the pipeline companies differs significantly from the nature of its rationalization of such imposition in the administrative rulemaking proceeding which resulted in Order No. 427. In proposing the annual reserves added assessment, the Commission simply stated that the costs of the producer certificate program would be paid by the pipelines "[f]or reasons of administrative convenience" (A. 5). Despite the submission of written comments objecting to this annual assessment,[28] the Commission promulgated it as proposed without any discussion of the objections raised (A. 16, 109). Following applications for rehearing of its Order No. 427,[29] the Commission for the first time sought to justify the reserves added assessment in its order denying rehearing on the ground that the processing of producer certificate applications bestows certain "clear benefits" upon the pipeline companies (A. 149).

The Commission now argues before this Court that although its producer certificate program does benefit the general public, the benefits received by the pipelines

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[28] See, for example, the "Views and Comments" of INGAA (A. 78-80).

[29] In their applications for rehearing of Order No. 427, INGAA and Tennessee Gas Pipeline Company continued to object to the reserves added assessment (A. 123-124, 133).

from this regulatory activity are "above and beyond those accruing to the public" (Br. p. 16). Nowhere does the Commission discuss the obvious fact that in applying for and obtaining certificates of public convenience and necessity from the Commission authorizing the sale of their natural gas in interstate commerce, the producer applicants are the special beneficiaries of the Commission's producer certificate program. Thus, the Commission chooses to ignore the plain language of Title V which expressly provides that a federal agency which issues a "certificate" to any person may charge such person a fee designed to cover the cost of providing the service. Further, Circular A-25 makes clear that recipients of certificates of necessity and convenience receive a "special benefit" for which a charge should be imposed (App. C, *infra,* p. 7a).

The pipelines are charged graduated fees for the processing of their own certificate applications and these fees are admittedly designed to make the Commission's pipeline certificate program self-sufficient. The pipelines do not complain of such fees, recognizing that as certificate applicants they are identifiable recipients of a special service rendered by the Commission. However, it is wholly inconsistent, inequitable, and violative of the intent of Title V to charge pipelines for the Commission's cost of providing a comparable service to the producers of natural gas.

When the Commission first considered the question of assessing user charges to render its producer certificate program self-sufficient, it is clear that it was considering the imposition of such charges upon the producers. However, in its Notice of Proposed Rulemaking issued September 15, 1965, Docket No. R-282, which culminated in Order No. 317 (35 FPC 30), the Commis-

sion concluded that this type of charge would be improper, stating (App. D, *infra*, p. 16a):

> ". . . The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, *both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons . . .*" (emphasis supplied).

The above-quoted language shows that although the Commission recognized that its producer certificate program provided certain benefits to producers, the primary beneficiary of such program was the general public since it involved the resolution of rate questions underlying producer certificate applications.[30] Consequently, the producers were not assessed any fees or charges associated with the processing of their certificate applications.

The Court has considered the treatment to be accorded rate issues in producer certificate proceedings, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959). In that case, the Commission had certificated sales by producers at the initial contract price negotiated with the pipeline purchaser. The Court, however, directed the lower court to remand the producer applications to the Commission for further proceedings. In so doing, the Court noted that the Natural Gas Act "was so framed as to afford consumers a complete, permanent and effec-

[30] At that time, the Commission properly considered its rate regulation activities as being performed "primarily for the benefit of the general public rather than the regulated companies" (App. D, *infra*, p. 16a).

tive bond of protection from excessive rates" and that the heart of the Act is its certificate and rate provisions (360 U.S. at 388). Consequently, the Court held that although the rate provisions of the Act are not directly applicable to a certificate proceeding, "a most careful scrutiny and responsible reaction to initial price proposals" are required of the Commission in producer certificate proceedings (360 U.S. at 391).

The Court suggested that the Commission could carry out this regulatory responsibility by attaching a price condition to the certificate granted to the producer "[w]here the proposed price is not in keeping with the public interest" (360 U.S. at 391). Thus, it is reasonable to conclude that a controlling standard in the Commission's performance of its producer certificate responsibilities is the protection of the consumers from excessive rates. Viewed in this context, restrictions placed upon producer rates by the Commission in the producer certification process necessarily are for the primary benefit of the consumer.

The Commission, however, claims that its producer certificate program benefits the pipelines in such a manner as to justify the imposition of the costs of such producer regulation upon the pipelines. Examples of such alleged benefits are (1) the elimination of indefinite price provisions in producer contracts, (2) standardization of the quality of gas delivered by producers, (3) the establishment of reasonable terms and conditions regarding advanced payments for gas made by pipeline operators to producers and (4) the "special steps" taken by authorizing expedited deliveries through the issuance of temporary certificates and the promulgation of its optional certification procedure (Br. pp. 18-19).

With respect to the elimination of indefinite price provisions, this Court sustained the Commission's rulemaking order on this matter on the grounds that the Commission was acting to protect "the consumer interest." *Federal Power Commission* v. *Texaco Inc.*, 377 U.S. 33 at 41 (1964), citing *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). This Court made clear in *Texaco* that the Commission's rulemaking there involved was for the protection of "consumer interests" against "a built-in device for ready manipulation of rates upward" (*id.* at 42). Obviously both the Commission and this Court in *Texaco* were concerned not with the pipelines but with the ultimate consumers.

As for the standardization of the quality of gas, it is the ultimate consumer who is protected by any such action since he is the one who is burning the gas and if the Btu content of the gas which he purchases is either high or low it is his bill which is affected.

The Commission's claim that its supervision of advance payments [31] for gas made by pipelines to producers confers a special benefit upon pipelines is also untenable. In dealing with the problem of very substantial advance payments required to be paid by the pipelines to producers for gas prior to its delivery, the Commission has permitted pipelines to include advance payments in their rate base under specified conditions. Certain rulemaking orders of the Commission permit-

[31] Advance payments are an outgrowth of the existing gas supply shortage. In order to generate the investment capital needed for the development of gas reserves to alleviate this crisis, producers have required advance payments from the pipelines as a condition to entering into gas sales contracts, Notice of Proposed Rulemaking, issued January 23, 1970 in Docket No. R-380, 35 F.R. 4008.

ting such rate base treatment have been affirmed. *Public Service Commission of New York* v. *Federal Power Commission*, 467 F.2d 361 (D. C. Cir. 1972).[32]

There, the court of appeals observed that at the time the orders in question were issued it had become well-known that a dangerous shortage of gas was developing and that in according rate base treatment to advance payments, the Commission "hoped thereby to encourage development by producers, and thus help alleviate the gas shortage" (467 F.2d at 366). The court found these orders to be "a reasonable attempt to increase the available capital for development of gas production" by the producers (467 F.2d at 369). The court of appeals viewed the treatment accorded to advance payments by pipelines as follows (467 F.2d at 369):

> ". . . the FPC has made an allocation between competing interests (here the interests of the consumers in keeping the rates low and the interests of the producers—and, indeed, ultimately the consumers—in having more capital available for development of gas production capabilities) . . ."

Thus, it is apparent that the primary beneficiaries of this particular regulatory activity are not the pipelines. The Commission's assertion to the contrary is wholly unsupported.

As for temporary certificates granted to individual producers upon their request, this is a long-standing practice of the Commission. It is beyond dispute that the regulation under which the Commission issues temporary certificates to producers is clearly designed to

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[32] This decision is erroneously cited in the Commission's brief as 462 F. 2d 853 (Br. p. 18, n. 10).

protect the producer applicants from emergency situations directly affecting their own economic interests. Thus, the regulation permits the Commission to certificate a sale of gas by a producer on a temporary basis without prior notice or hearing in an emergent situation relating to the particular producer applicant. The regulation defines an emergency as including "drainage, threatened loss of lease, flaring, economic hardships resulting from payment of shut-in royalties, or similar situations", 18 C.F.R. 157.28(a).[33]

The decision cited by the Commission regarding the issuance of temporary certificates to producers upheld the Commission's regulation as valid and only highlights the indisputable fact that the primary beneficiary of a temporary certificate issued to a producer is the producer himself. *Public Service Commission of New York* v. *Federal Power Commission*, 327 F.2d 893, 896, 897 (D.C. Cir. 1964). This Court's decision in *Federal Power Commission* v. *Sunray DX Oil Company*, 391 U.S. 9, 40-41, 44-45 (1968) serves to corroborate the foregoing.

Similarly the optional certification provisions of the Commission's regulations (18 C.F.R. 2.75, 37 F.R. 16196) are designed primarily for the benefit of the producers by permitting them, under the conditions specified, to put into effect a contract rate notwithstanding that it "may be in excess of an area ceiling rate established in a prior opinion or order of this

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[33] This regulation has been in effect since 1956, Order No. 193, issued November 20, 1956, Docket No. R-155, 16 FPC 497. It has not been modified, in material part, since its promulgation long before any indication of a gas supply crisis had become apparent.

Commission", 18 C.F.R. 2.75(e). The objective of the Commission's provision for optional pricing is the same as its regulations covering advance payments, namely, to stimulate the introduction of new gas supplies into the interstate market. The issuance of a certificate under these provisions of the Commission's rules "shall constitute a final determination that the rates, charges, and services therein specified are just, reasonable, and required by the present and future public convenience and necessity", 18 C.F.R. 2.75(l).

It is thus clear that the services whose costs the Commission proposes to recoup through annual charges assessed against the pipelines do not provide the pipelines with any special benefits within the intendment of Title V. Whatever special benefits result from such services accrue to either the producers, the consumers, or both.

C. The Decision of the Court Below Simply Restricts the Commission's Assessment of Fees and Charges to the Intent of Title V.

The Commission's brief, as in the case of its Order No. 427, ignores the fact that the Commission has, in reliance upon authority conferred by Title V of the Independent Offices Appropriation Act of 1952, made many of its activities self-sustaining by the imposition of fees upon applicants for relief under various sections of the Natural Gas Act.[34] Other substantial fees

[34] Under Part 159 (18 C.F.R. 159.1, 31 F.R. 431, 4890) of the Commission's regulations, specified fees are assessed in connection with applications for: exemptions under Section 1(c) of the Natural Gas Act, authorizations to export or import natural gas, permits under Executive Order 10485 relating to applications for authority in connection with facilities located at the borders of

and charges are collected by the Commission pursuant to authority conferred upon it under Part I of the Federal Power Act, 16 U.S.C. 791a, *et seq.* (See the Commission's 1972 Annual Report to the Congress, App. B, Table 2, Collections).

The allegation that the lower court's decision results in "virtual nullification" of Title V is simply not true (Br. p. 21). The court by its decision was not displacing the Commission's view of "desirable public policy" but was only confining the Commission to the powers conferred upon it by Title V.

The Commission contends that the "rather sparse legislative history of Title V" confirms its views of the correctness of its assertion of power to impose the annual charges in question (Br. p. 23).

A full discussion of the legislative history of Title V has been set forth at pages 3-6 above. The Commission's brief argues that nothing in the report of the House Committee on Appropriations or elsewhere in the legislative history states that it would be "inappropriate" to charge for services by annual charges and assessments where, as here, "there is no other provision of law prohibiting such charges" (Br. p. 23). Jurisdictional powers are not conferred by the absence of a prohibition but rather by an affirmative grant of authority. The decision of the court below is clearly in

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the United States for the export or import of natural gas to or from a foreign country, orders under Section 7(a) of the Act, for abandonment of services or facilities under Section 7(b), certificates under Sections 7(c) and (e) of the Act, determinations under Section 5 of the Outer Continental Shelf Lands Act, and for amendments to applications for any of the aforesaid authorizations.

conformity with the legislative intent of Congress in enacting Title V.

The Commission makes reference to *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313 (Br. pp. 7, 14-15, 24-25) in which decision the United States Court of Appeals for the Fifth Circuit upheld the fee schedules prescribed by the Federal Communications Commission for the broadcasting and cable television industries. Sections I and III of the opinion, which discuss the fees assessed broadcasters and cable TV operators, make clear that both industries are protected against encroachment upon their service areas in much the same way as the Federal Power Commission protects the natural gas pipeline industry by requiring pipelines to obtain certificates for the entry into a new market or for the expansion of their facilities serving existing markets. INGAA does not challenge the Commission's authority to impose fees to recover the costs of administering the pipeline certificate programs.

But as the Commission recognized in its petition to this Court requesting that certiorari be granted, the nature of the Federal Communication Commission's regulation of the broadcast and CATV industries is "sufficiently different from the nature of the Federal Power Commission's regulation of the electric power and natural gas industries to make detailed comparison of the respective benefits bestowed by the different agencies difficult" (Pet. p. 16). This is clearly correct. We believe that the nature of the assessments involved here and those involved in *Clay* are so different that each case must stand on its own feet.

CONCLUSION

The judgment of the Court of Appeals should be affirmed insofar as it sets aside the annual charges levied against natural gas pipeline companies by Order No. 427 of the Federal Power Commission.

Respectfully submitted,

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September 19, 1973

APPENDIX A

The portion of H. Rep. No. 382, 82d Cong., 1st Sess. (pp. 2-3) pertaining to Title V of the Independent Offices Appropriation Bill of 1952 is as follows:

FEES AND CHARGES

The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries. Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and considerations.

APPENDIX

It is understood that other committees of the Congress have interested themselves in this matter and that studies now are under way which may result in further legislation to require that adequate consideration be received for such services. However, such studies are necessarily time-consuming and the required legislation may not be enacted for a considerable period. Accordingly, the Committee has inserted language in the bill (Title V, page 50) which would authorize and encourage the charging or increasing of fees to the extent permitted under present basic laws, but which would in no way conflict with studies now under way to effect changes in such basic laws.

It is estimated that in 1952 the Government will receive more than $300,000,000 in fees from sources of the type here under consideration. It seems entirely possible that many of these fees could be raised, and that fees could be charged for other services of similar types in cases where no charge is now made, to the extent that the Government might realize upwards of $50,000,000 additional revenue.

APPENDIX

APPENDIX A

The portion of H. Rep. No. 384, 82d Cong., 1st Sess. (pp. 2-3) pertaining to Title V of the Independent Offices Appropriation Bill of 1952 is as follows:

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The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries. Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and other related considerations.

It is understood that other committees of the Congress have interested themselves in this matter and that studies now are under way which may result in further legislation to require that adequate consideration be received for such services. However, such studies are necessarily time-consuming and the required legislation may not be enacted for a considerable period. Accordingly, the Committee has inserted language in the bill (Title V, page 60) which would authorize and encourage the charging or increasing of fees to the extent permitted under present basic laws, but which would in no way conflict with studies now under way to effect changes in such basic laws.

It is estimated that in 1952 the Government will receive more than $300,000,000 in fees from sources of the type here under consideration. It seems entirely possible that many of these fees could be raised, and that fees could be charged for other services of similar types in cases where no charge is now made, to the extent that the Government might realize upwards of $50,000,000 additional revenue.

The bill would provide authority for Government agencies to make charges for these services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. It is not the Committee's intention in including this provision to disturb existing practices with respect to charges for postal services, sales of power, or the interest on loans by the Government.

APPENDIX B

The statement of Congressman Sidney R. Yates made on the floor of the House of Representatives on May 3, 1951 in explanation of Title V of the Independent Offices Appropriation Bill, 1952 (H. R. 3880) as reported out by the House Committee on Appropriations in H. Rep. No. 384, 82d Cong., 1st Sess. is as follows (97 Cong. Rec. 4809):

For the first time, our subcommittee went into a new question, the question as to whether or not there should be charges and fees made by regulatory agencies of the Government for many of the services which they render to those who come within their jurisdiction. One of the great problems that faces our country is the difficulty of the regulatory commissions to cope with the complexities of our growing industralized society, to deal with the regulatory problems for which they were created and with which they are confronted. A realistic appraisal of their function requires increased appropriations, because their problems and difficulties grow as our economy grows. As an example I cite the Federal Communications Commission. The Federal Communications Commission grants franchises, licenses, certificates of convenience and necessity, if you will, to all broadcasting stations upon application for such licenses, franchises, and certificates. The Commission undertakes extensive hearings first in connection with a construction permit; secondly on the question as to the allocation of the position of a particular broadcaster in the spectrum of megacycles over which the Federal Communications Commission has control. That is a pretty difficult job and a complicated job, and entails extensive hearings by the Federal Communications Commission. The taxpayers pay every dollar of the charges and of the costs that go into that hearing. The companies pay nothing, other than taxes, and I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to

assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, that it should pay some of the costs of the hearings. It is perfectly proper that the franchised company make a profit, and there has been much profit making. Such companies should assume a greater share of the costs, because regulation is necessary. I think also that the Government should be able to recapture some of the costs that go into the hearings of the other regulatory agencies. Such fees are appropriate for many of the hearings which take place before the Interstate Commerce Commission. I know that in my home city of Chicago the city requires the owner of every building which operates a passenger elevator to obtain a license for that elevator, and in order to recoup the costs for inspection in such licensing it requires a rather nominal license fee.

The Interstate Commerce Commission is required to inspect locomotives of railroads, safety appliances, signaling systems, various facilities of that type. The Government pays every cent for this operation. In addition to that, much of the work of the Interstate Commerce Commission is involved with hearings on applications for certificates of convenience and necessity for bus lines and other common carriers. The Government assumes the complete cost of such hearings in spite of the fact that here again it grants a franchise which is very valuable to the company making the application, and in the operation of which franchise it is protected from competition.

Each of the Commissioners who appeared before us was asked his opinion as to whether or not it was feasible to charge for a portion of the operations of the agency, and in each event the Commissioner thought that it would be practicable. Not only that, one Commissioner expressed the viewpoint that such a practice would not only be feasible, but would deter and do away with many superfluous applications. Therefore, the subcommittee in its de-

liberations decided to put a new legislative section into the bill which would permit each of the agencies to appraise its own operations to see whether or not it would be possible to recapture for the Government some of the costs that the Government incurs in connection with this regulation through the establishment of a schedule of fees.

APPENDIX C

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

September 23, 1959 CIRCULAR No. A-25

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User Charges

1. *Purpose.* Bureau of the Budget Bulletin No. 58-3 of November 13, 1957, set forth some general policies for developing an equitable and uniform system of charges for certain Government services and property. This Circular incorporates the policies contained in that Bulletin and gives further information with respect to: (a) the scope of user charge activities; (b) guidelines for carrying out the approved policies; and (c) agency submission of periodic status reports. It also prescribes Standard Form No. 4 on which periodic status reports are required.

Because this Circular applies also to the areas previously covered by Bureau of the Budget Circular No. A-28 of January 23, 1954, that Circular is hereby rescinded.

2. *Coverage.* Except for exclusions specifically made hereafter, the provisions of this Circular cover all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large. The specific exclusions which continue to be governed by separate policies are fringe benefits for military personnel and civilian employees; sale or disposal under approved programs of surplus property; postal rates; interest rates; and fee aspects of certain water resources projects (power, flood control, and irrigation). In addition this Circular does not apply to activities of the legislative and judicial branches, the municipal government of the District of

Columbia, the Panama Canal Company or the Canal Zone Government.

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

b. *Lease or sale.* Where federally owned resources or property are leased or sold, a fair market value should be obtained. Charges are to be determined by the application of sound business management principles, and so far as practicable and feasible in accordance with comparable commercial practices. Charges need not be limited to the recovery of costs; they may produce net revenues to the Government.

4. *Agency responsibility.* The responsibility for the initiation, development, and adoption of schedules of charges and fees consistent with the policies in this Circular continues to rest with the agency. Each agency shall:

a. Identify the services or activities covered by this Circular;

b. Determine the extent of the special benefits provided;

c. Apply accepted cost accounting principles in determining costs;

d. Establish the charges; and

e. In determining the charges for the lease and sale of Government-owned resources or property, apply sound business management principles and comparable commercial practices.

5. *Cost, fees and receipts, and their determination.*

a. *Determination of costs.* Costs shall be determined or estimated from the best available records in the agency, and new cost accounting systems will not be

established solely for this purpose. The cost computation shall cover the direct and indirect costs to the Government of carrying out the activity, including but not limited to:

(1) Salaries, employee leave, travel expense, rent, cost of fee collection, postage, maintenance, operation and depreciation of buildings and equipment, and personnel costs other than direct salaries (e.g., retirement and employee insurance);

(2) A proportionate share of the agency's management and supervisory costs;

(3) A proportionate share of military pay and allowances, where applicable;

(4) The costs of enforcement, research, establishing standards, and regulation, to the extent they are determined by the agency head to be properly chargeable to the activity.

b. *Establishment of fees to recover costs.* Each agency shall establish fees in accordance with the policies and procedures herein set forth. The provisions of this Circular, however, are not to be construed in such a way as to reduce or eliminate fees and charges in effect on the date of its issuance. The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient. The cost of providing the service shall be reviewed every year and the fees adjusted as necessary. In establishing new fees and increasing existing fees the agency may make exceptions to the general policy (paragraph 3, above) under such conditions as illustrated below.

(1) The incremental cost of collecting the fees would be an unduly large part of the receipts from the activity.

(2) The furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization; or comparable fees are set on a reciprocal basis with a foreign country.

(3) The recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare.

(4) Payment of the full fee by a State, local government, or nonprofit group would not be in the interest of the program.

c. *Disposition of receipts.* Legislative proposals shall generally avoid disturbing the present rule that collections go into the general fund of the Treasury as miscellaneous receipts. However, exceptions may be made where:

(1) It is intended that an agency or program or a specifically identifiable part of a program be operated on a substantially self-sustaining basis from receipts for services performed or from the sale of products or use of Government-owned resources or property.

(2) The agency can show that the initiation or increase of fees or charges is not feasible without earmarking of receipts.

(3) The receipts are in payment of the cost of authorized special benefits for which the demand is irregular or unpredictable, such as inspections performed upon request outside the regular duty hours.

This Circular is not intended to change the present system of sharing with States and counties receipts from the lease of certain lands and the sale of certain resources.

6. *Changes in existing law.* In cases where collection of fees and charges for services or property in accordance with this Circular is limited or restricted by provisions of existing law, the agencies concerned will submit appropriate remedial legislative proposals to the Bureau of the Budget under the established clearance procedure, as provided in Bureau of the Budget Circular No. A-19.

7. *New activities.* In the establishment of new Federal activities which would provide special benefits, the agencies concerned are to apply the policies and criteria set forth in this Circular.

8. *Reports to the Bureau of the Budget.* Each agency shall make a report by December 31, 1959, for each bureau or comparable organizational unit, of the costs and charges for all services or property covered by this Circular, and shall also make a report of changes not later than December 31 of each succeeding year as a result of its annual review of such costs and charges. The initial report for any new agency hereafter established (including those established by reorganization) shall be submitted on December 31 following the end of the first fiscal year during which the agency was in operation. Each report shall cover the situation as of the preceding June 30, and shall be prepared in accordance with the instructions set forth in the attachments to this Circular.

By direction of the President:

MAURICE H. STANS
Director

Attachments

ATTACHMENT A
CIRCULAR No. A-25

INSTRUCTIONS FOR THE PREPARATION OF ANNUAL REPORTS ON USER CHARGES

1. *Form and coverage of reports.* Reports shall be prepared on Standard Form No. 4, as illustrated in Attachment B. An original and two copies will be required.

The initial report should represent a complete inventory of all services of the agency which provide a special benefit to recipients above and beyond those accruing to the public at large, and all activities under which federally owned resources or property are or could be sold or leased.

Subsequent reports covering the annual review of costs and charges shall cover only (a) services and activities not reported earlier; (b) services and activities for which charges have been changed; and (c) services and activities for which changes in the applicable category (as described below) have taken place.

2. *Preparation of Standard Form No. 4.*

a. A separate form will be prepared for each of the following categories, where applicable:

(1) Special services for which existing charges are producing full cost recovery; and lease or sale activities which are returning fair market value.

(2) Special services for which existing charges are producing less than full cost recovery; and lease or sale activities for which less than fair market value is being obtained.

(3) Special services and activities for which no charges are currently being made, and for which charges are apparently required by the provisions of this Circular.

(4) Special services and activities for which no charges are to be made in accordance with the policy guidelines and exceptions provided in this Circular.

(5) Services and activities which have been discontinued or transferred to other agencies since the previous report. (This category is not applicable to the initial report.)

The category of items covered by each form will be identified in the heading by placing an "X" in the box corresponding with the number of the category as shown above. Forms need not be submitted for categories in which there is nothing to be reported.

b. Columns on the form will be completed as follows:

(1) Enter the identification number for the service or activity. Each service and activity shall be assigned an identification number which shall be retained from year to year, to facilitate identification in future annual reports. Agencies may devise their own coding systems for this purpose.

(2) List each special service provided under a heading "Special services", and each lease or sale activity under a heading "Lease or Sale."

(3) Enter the unit for measuring the service or property provided.

(4) Enter the amount of the charge being made for each unit as of the preceding June 30. In cases where there are various rates for differing situations, a summary schedule of rates may be attached in lieu of listing each rate individually.

(5) Enter the date the charge shown in column 4 became effective.

(6) Enter the amount of the charge which was made previous to the date in column 5.

(7) Enter the number of units of activity for the last completed fiscal year.

(8) Enter (in thousands of dollars) the cost of providing the service or the fair market value of resources or property sold or leased.

(9) Enter (in thousands of dollars) the amount of collections (net of refunds) during the last completed fiscal year.

(10) Enter the symbol of the receipt account, appropriation account, or fund account (excluding deposit funds) to which the collections were or will be credited.

(11) Enter any pertinent explanatory comments relating to the information shown in the preceding columns. On reports covering categories 2, 3, and 4, specifically note in this column, for each item, the reason(s) that full cost recovery or fair market value is not obtained. Also indicate whether full cost recovery for special services or fair market value for lease and sale activities can be obtained under existing law; the status of specific legislative proposals (e.g., under study, drafted, cleared, introduced, or reported); and the status of proposed administrative changes in fees and charges, including effective dates.

On reports subsequent to the initial report, indicate in this column the previous category in which the item was reported. On reports covering category (5), identify the services and activities transferred to other agencies or organizational units and the agency or organizational unit to which the transfer was made.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-282

ESTABLISHMENT OF FEES TO BE PAID BY APPLICANTS FOR NATURAL GAS PIPELINE COMPANY CERTIFICATES AND OTHER AUTHORIZATIONS

Notice of Proposed Rulemaking

(18 CFR, Parts 152, 153, 156, 157, 159)

(Issued September 15, 1965)

1. Pursuant to section 4 of the Administrative Procedure Act the Commission gives notice that it proposes to establish a schedule of filing fees relating to applications by natural gas pipeline companies for certificates of public convenience and necessity as well as applications for exemption under section 1(c) of the Natural Gas Act, for export or import authority, for an order directing a pipeline company to serve a local distributor or for abandonment authority.

2. Congress has established the policy "that any * * * benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared or issued by any Federal agency * * * to or for any person * * *, except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible". Independent Offices Appropriation Act of 1952, 5 U.S.C. 140. In order to accomplish this objective, Congress authorized the head of each agency, which includes the Federal Power Commission, to prescribe by regulation such fees and charges as are determined to be fair and equitable "taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other

pertinent facts." Congress also provided that the regulations prescribed by agencies in the Executive branch shall be as uniform as practicable and subject to such policies as the President may prescribe. The Bureau of the Budget on behalf of the President has issued Circular No. A-25, September 23, 1959, which sets forth general policies for developing an equitable and uniform system of charges for certain Government services and property so as to implement the provisions of the Independent Offices Appropriation Act of 1952.

3. The regulatory activities of the Federal Power Commission convey special benefits to identifiable recipients above and beyond those which accrue to the public at large. Congress has adopted the policy that the recipient of special benefits conveyed by a Federal agency program should pay a reasonable charge to defray the cost of the program and to relieve the general taxpayer who bears the major burden of supporting Federal agencies. The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies. The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons. The Commission already assesses charges against hydroelectric licensees for the purpose of defraying the costs of administration of Part I of the Federal Power Act (16 U.S.C. 803(e)).

However, we believe the public interest would be served by the establishment of a fair and equitable schedule of fees designed to recover our costs for the services rendered in processing applications for the certificating of interstate transportation and sale of natural gas for resale by pipeline companies and the other matters enumerated. We propose that all qualifying applicants pay a nominal filing fee of $50. In addition, we propose that applicants for authority to construct facilities for the transportation of gas pay a fee amounting to five one-hundredths of one percent of the estimated cost of the facilities for which a certificate is requested, payable at the time of filing, plus a fee of ten one-hundredths of one percent of the estimated cost of the facilities for which a certificate is granted and accepted.

The proposed fees are based upon the Commission's cost of conducting this function, the number of filings in this category and the estimated costs of the facilities for which application was made in recent years. We recognize that neither the Commission's costs nor the dollar value of facilities will remain static and, therefore, that it may be necessary to revise either the $50 fee or the percentage factors or both in the light of subsequent experience.

Finally, we are proposing the accounting to be followed by the companies in recording on their books the fee payments being proposed herein, that the companies charge Account 302, Franchises and Consents, with appropriate amortization, for the amounts of user charges paid by them if they are successful in obtaining certificates, and if the certificate is not granted, that the amounts expended be charged to Account 928, Regulatory Commission Expenses. Since a portion of the user charges will be assessed against the companies at the time the application is filed, we propose that the companies include the initial amounts paid in Account 186, Miscellaneous Deferred Debits, and clear that account to either Account 302 or

928 when final disposition is made of the application by the Commission.

4. Pursuant to section 4 of the Administrative Procedure Act and § 1.19(a) of the Commission's rules (18 CFR 1.19(a)), any interested person may submit to the Federal Power Commission by November 5, 1965, data, views, and comments in writing concerning the amendments now being proposed herein. The Commission will consider these written submittals before taking any action upon the proposed amendments. An original and nine copies of any such submittals should be filed.

5. These amendments to the Commission's Regulations Under the Natural Gas Act (18 CFR, Chapter I, Subchapter E) are proposed to be issued under the authority of the Natural Gas Act, as amended, particularly sections 1(c), 3, 7, 8 and 16 thereof (52 Stat. 822, 824, 825, 830; 56 Stat. 83; 68 Stat. 36; 15 U.S.C. 717(c), 717(b), 717f, 717g, 717o); Executive Order 10485 (18 F.R. 5397; 3 CFR, 1949-53 Comp. 970); section 5 of the Outer Continental Shelf Lands Act (67 Stat. 462, 464; 43 U.S.C. 1334 (c)); section 140 of Title 5 of the U.S. Code; and Budget Bureau Circular A-25 (September 23, 1959).

6. In consideration of the foregoing, the Commission proposes to amend Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations as follows:

a. Amend Subchapter E by adding a new Part 159 to read as follows:

"Part 159—Filing Fees

§ 159.1 Filing fees for applications not involving construction of facilities.

A filing fee of $50 shall accompany each of the following:

(a) Applications for exemption under section 1(c) of the Act;

(b) Applications to import or export natural gas under section 3 of the Act;

(c) Applications for a permit to maintain facilities at the borders of the United States under E. O. 10485;

(d) Applications and petitions to intervene requesting orders under section 7(a) of the Act;

(e) Applications for authority to abandon under section 7(b) of the Act;

(f) Applications under sections 7(c) and (d) of the Act for certificates of public convenience and necessity;

(g) Applications for a determination by the Commission pursuant to section 5 of the Outer Continental Shelf Lands Act;

(h) Amendments to any of the applications listed in (a) through (g) hereof.

§ 159.2 Filing fees for applications and amendments involving the construction of facilities.

In addition to the fees prescribed by § 159.1, applicants for a certificate of public convenience and necessity under sections 7(c) and (d) of the Act to construct and operate facilities shall pay the following fees:

(a) Within 30 days following the issuance of Notice of Application, an amount equal to 5/100 of one percent (i.e., 0.0005) of the estimated cost of construction of new facilities;

(b) Within 30 days following the grant of the certificate, an amount equal to 10/100 of one percent (i.e., 0.001) of the estimated cost of the facilities;

(c) If an amendment to a pending application increases the total cost of the facilities for which a

certificate is requested, an additional amount, computed with respect to the increase as provided in paragraph (a) hereof, shall be paid;

(d) If, upon completion of the facilities authorized, the actual cost thereof exceeds the estimated cost, the statement of actual cost, required to be submitted by § 157.20(c)(4) of this chapter, shall be accompanied by an amount equal to 15/100 of one percent of the excess of actual cost above estimated cost.

§ 159.3 Miscellaneous.

(a) *Method of payment.* Fee payments shall be by certified check or money order payable to the Treasurer of the United States. No fees will be refunded. All fees collected will be paid into the United States Treasury as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriation Act of 1952 (5 U.S.C. 140).

(b) *Exemption.* The provisions of this part shall not apply to independent producers, as defined in these regulations.

(c) *Amendments to outstanding certificates.* Applications to amend outstanding certificates, authorizations or orders will be treated as an initial application for the purposes of this part.

§ 159.4 Accounting for fees paid pursuant to Part 159.

A natural gas company subject to the provisions of this part shall account for the fees paid as follows: Pending Commission action on certificate and other applications, amounts paid when an application is noticed shall be charged to Account 186, Miscellaneous Deferred Debits, and held in suspense

until the application is either issued or denied. Upon grant of a certificate or other order by the Commission, the amount suspended in Account 186 and the additional charges then due shall be charged to Account 302, Franchises and Consents, with appropriate amortization, with a separate record maintained for each transaction. If the application is denied, the amount suspended in Account 186 shall be charged to Account 928, Regulatory Commission Expenses, in the year the application is denied.

• • •

b. Appropriate technical amendments to Parts 152, 153, 156 and 157 incorporating therein, by reference, the requirements of Part 159."

By direction of the Commission.

GORDON M. GRANT,
Acting Secretary.

INDEX

Page

QUESTION PRESENTED 1

SUPPLEMENTAL STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT:

Title V of the Independent Offices Appropriations Act for 1952 does not authorize the annual assessments on electric utilities proposed by the Federal Power Commission 10

I. The Federal Power Act precludes the FPC from assessing charges for the general administration of Parts II and III of the Act and was not superseded by Title V of the Independent Offices Appropriations Act for 1952 10

II. The general administration of Parts II and III of the Federal Power Act does not constitute the conferring of a "benefit" on the electric utility industry within the meaning of Title V 13

III. The legislative history of Title V conclusively sustains the decision of the Court of Appeals 18

IV. The Bureau of Budget's consistent construction of Title V supports the interpretation of the Court below 31

V. The Federal Power Commission had previously consistently construed Title V as having limited scope 41

CONCLUSION 48

CITATIONS

CASES: Page

Aeronautical Radio, Inc. v. United States, 335 F.2d 304 (7th Cir. 1964) 26

Clay Broadcasting Corp. v. United States, 464 F.2d 1313 (5th Cir. 1972), cert. granted *sub nom.* National Cable Television Association v. United States, No. 72-948 .....4, 47

Dairyland Power Cooperative, 37 F.P.C. 12 (1967) .. 16

Duke Power Co. v. FPC, 401 F.2d 930 (D.C. Cir. 1968) 5

Jersey Central Power and Light Co. v. FPC, 319 U.S. 61 (1943) 5

New England Electric System, 38 S.E.C. 193 (1958) .. 3

Old Colony R. Co. v. Commissioner, 284 U.S. 552 (1932) 17

Public Service Commission of the State of New York v. FPC, 436 F.2d 904 (D.C. Cir. 1970) 39

United States v. Merriam, 263 U.S. 179 (1923) 17

U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968) .. 44

STATUTES AND REGULATIONS:

Federal Power Act, 16 U.S.C. § 791a, et seq. .....*passim*

Section 10(e), 16 U.S.C. § 803(e) 7, 8, 10, 11, 12
Section 201(a), 16 U.S.C. § 824(a) 5
Section 201(f), 16 U.S.C. § 824(f) 16
Section 202(e), 16 U.S.C. § 824a(e) 4
Section 203, 16 U.S.C. § 824b 4
Section 204, 16 U.S.C. § 824c 4, 26
Section 205, 16 U.S.C. § 824d 4, 14
Section 305, 16 U.S.C. § 825d 4
Section 311, 16 U.S.C. § 825j 5
Section 312, 16 U.S.C. § 825k 11
Section 318, 16 U.S.C. § 825q 4

Federal Water Power Act, 41 Stat. 1062 .....7, 11

Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. § 483a .....*passim*

Natural Gas Act, 15 U.S.C. § 717, et seq. 2, 5, 13, 20, 25, 42, 46

Public Utility Act of 1935, Title II, 49 Stat. 838..7, 10, 11, 12

Page

Public Utility Holding Company Act, 15 U.S.C. § 79 et seq. 2, 3
Section 2(a)(29(a), 15 U.S.C. § 79(b)(a)(29) .. 3

10 C.F.R. § 170.12(a) 47
10 C.F.R. § 170.12(b) 47
10 C.F.R. § 170.12(c) 47
10 C.F.R. § 170.21 47
14 C.F.R. § 389.25 47
14 C.F.R. § 389.25(a)(2) 47
14 C.F.R. § 240.12b-7 47
17 C.F.R. § 240.15b9-1 47
17 C.F.R. § 240.15b9-2 47
17 C.F.R. § 275.203-3 47
49 C.F.R. § 1002.2 47

MISCELLANEOUS:

97 Cong. Rec. 4908 28

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1952, 82d Cong., 1st Sess. (1951) 21, 22, 23, 24, 25, 26

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1953, 82d Cong., 2d Sess. (1952) 42, 43

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1954, 83d Cong., 1st Sess. (1953) 26

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1955, 83d Cong., 2d Sess. (1954) 44

Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess. (1970) 6

Page

Notice of Proposed Rulemaking, Docket No. R-282, issued September 22, 1965, 30 F.R. 12077 46

Bureau of the Budget Bulletin No. 51-13, May 21, 1951 31

Bureau of the Budget Circular No. A-25, November 5, 1953 32

Bureau of the Budget Bulletin No. 58-3, November 13, 1957 .....32, 33

Bureau of the Budget Circular No. A-25, September 23, 1959 .....9, 10, 15, 35, 36

FPC Order Nos. 317 and 317-A, 35 F.P.C. 30, 392 (1966) 45

S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 11

H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) 11

S. Rep. No. 2120, 81st Cong., 2d Sess. (1950) 18, 37

H.R. Rep. No. 384, 82d Cong., 1st Sess. (1951) 12, 27

S. Rep. No. 1467, 84th Cong., 2d Sess. (1956) 21, 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1162

FEDERAL POWER COMMISSION, *Petitioner*

v.

NEW ENGLAND POWER COMPANY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NEW ENGLAND POWER COMPANY

QUESTION PRESENTED

Whether Title V of the Independent Offices Appropriations Act for 1952 authorizes the FPC to assess annual charges on electric utilities subject to its jurisdiction to recover the unreimbursed cost of its activities under Parts II and III of the Federal Power Act, including the cost of investigations, studies, and programs the FPC decides to undertake under the broad authority thereof, in addition to authorizing the imposition of filing fees on electric

utilities seeking Commission authorizations under the Act.[1]

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent New England Power Company ("NEPCO") supplements the statement of the case set forth in the brief for petitioner Federal Power Commission ("Commission", "FPC" or "Government") in the following particulars.

A. NEPCO is engaged in the generation, purchase, transmission and sale of electric energy at wholesale in interstate commerce and also sells at retail to a small number of industrial customers. It does business in Massachusetts, New Hampshire, and Vermont and is subject to the jurisdiction of the Federal Power Commission under the Federal Power Act, as well as the jurisdiction of the public utility commission of each of the states in which it does business. NEPCO is a subsidiary of New England Electric System ("NEES") which is a registered holding company subject to the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79 et seq.)

In addition to owning all of the common stock of NEPCO, NEES also owns all of the common stock in three other utilities engaged principally in the business of distributing electric energy to ultimate consumers. Those utilities are Granite State Electric Company, Massachusetts Electric Company, and the Narragansett Electric Company. Pursuant to rate schedules of file with the Federal Power Commission

[1] Also before the Court in appeals which have been consolidated is the question of the validity of certain annual charges assessed by the Commission against interstate natural gas pipelines to cover regulatory costs under the Natural Gas Act. That issue, involving a different industry and a different regulatory statute, is treated by other respondents in separate briefs.

the three distribution utilities purchase all of their energy at wholesale from NEPCO.

All but Granite State Electric Company own facilities used for the transmission of electric energy in interstate commerce and are public utilities within the meaning of the Federal Power Act. The functional arrangement within the NEES system whereby one utility, NEPCO, provides the bulk power supply and other utilities within the system purchase that power for distribution at retail is not a typical arrangement within the electric utility industry. Most utilities operate outside of a holding company system and are vertically integrated, i.e., they generate, transmit and sell at retail most of their power. Those utilities which operate within holding company systems are also, with very few exceptions, vertically integrated. The NEES system has developed its particular operating arrangements for historical, legal, and financial reasons. As subsidiary utilities of a holding company system registered under the Public Utility Holding Company Act, however, NEPCO and the three distribution affiliates operate as an integrated public utility system.[2]

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[2] Section 2(a) (29) (A) (15 U.S.C. § 79(b)(a)(29)) of the Public Utility Holding Company Act defines an integrated public utility system, in pertinent part, as

> a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States * * *

The Securities and Exchange Commission found the electric properties of the NEES system to be an integrated public utility system in 1958. *In the Matter of New England Electric System*, 38 SEC 193.

Before the Commission and the court of appeals NEPCO challenged not only the authority of the Commission to assess the annual charges involved here, but also contended that the formula adopted discriminated against it. The court below, however, held that "since it is our view that the Commission lacked statutory authority to act, we pretermit consideration of the latter issue . . ." (Pet. App. 2a.) Consequently, although the allocation issue is of great importance to NEPCO, it is not before the Court in this case and we do not brief it. We stress this point because the Fifth Circuit did decide the reasonableness of the FCC allocation formula at issue in *Clay Broadcasting Corp.* v. *U.S.*, 464 F.2d 1313, now before the Court *sub nom. National Cable Television Assoc.* v. *U.S.*, No. 72-948, and the Goverment's brief improperly seems to raise the fee formula issue in this case in several footnotes (Br. 15, n.8; 20, n.14).

B. While Parts II and III of the Federal Power Act authorize a wide range of activities by the FPC, including general investigations, studies and programs, regulatory jurisdiction over electric utilities under Parts II and III is strictly limited.[3] The

[3] Public utilities must make filings or file applications only in connection with the export of electric energy to a foreign country (§ 202(e), 16 U.S.C. ¶ 824a(e)); certain dispositions and consolidations of property used in interstate commerce and purchases of securities unless such transactions are also subject to the jurisdiction of the SEC (§§ 203, 318; 16 U.S.C. §§ 824b, 825q); security issuances and assumptions of liability, but only if not regulated by the state in which the public utility is organized and operating or the SEC (§§ 204, 318; 16 U.S.C. §§ 824c, 825q); wholesale for resale rate schedules and power contracts governing inter-utility relationships in interstate commerce (§ 205, 16 U.S.C. § 824d); and the holding of certain interlocking directorates (§ 305, 16 U.S.C. § 825d).

FPC is granted jurisdiction only over investor-owned electric utilities engaged in interstate commerce, which are defined as "public utilities" under the Act. It is not granted any jurisdiction over facilities used for the generation, intrastate transmission or local distribution of electric energy, nor are utilities required to obtain FPC licensing or certification of facilities necessary to conduct even interstate business, as are pipelines under the Natural Gas Act. Furthermore, the Commission has no jurisdiction over any activity already regulated by the Securities and Exchange Commission. See *Duke Power Company* v. *FPC*, 401 F.2d 930 (D.C. Cir. 1968).

Parts II and III, enacted in 1935, were designed to fill the gap in state regulatory authority when electric utilities operate in interstate commerce. *Jersey Central Power and Light Company* v. *FPC*, 319 U.S. 61 (1943). Congress left to the States their pervasive authority over the certification of facilities, standards of service, retail rates, security issues and activities of electric utilities in general within each state. The regulatory provisions of Parts II and III "... extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).

Congress also "authorized and directed [the Commission] to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy," in order to 'secure information necessary or appropriate as a basis for recommending legislation."[4]

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[4] 16 U.S.C. § 825j. This section specifies the detailed data which the Commission is to collect and maintain and directs that the Commission is to analyze "the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense" and to report the results of its investigations to Congress.

Under that athority the Commission carries out a wide variety of programs of a general evaluative and investigatory nature, such as its National Power Survey, which comprise a substantial portion of its annual budget.[5]

The filing fees established by the Commission for applications and other filings invoking Commission action under Parts II and III of the Federal Power Act were not challenged in the court below and include fees for (1) applications for physical connections to transmission facilities in interstate commerce and the construction of interconnected facilities at the national border, (2) applications for the acquisition by merger or consolidation, directly or indirectly, of facilities of another person used or useful for the interstate transmission of electric energy or for disposition by sale, lease or otherwise of such electric facilities to another person, (3) applications by officers or directors of public utilities to hold similar positions in other corporations, (4) all other corporate applications authorized by the Commission's regulations, and (5) all rate schedule filings under the Federal Power Act, such rate schedules being limited to contracts involving the transmission or sale for resale of electric energy in interstate commerce (R. 213-16).

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[5] For fiscal 1971, the FPC requested $2.2 million for such purposes, denominated "Electric Power Industry Systems Evaluation", compared to $1.7 million for "Electric Power Utilities Regulation", which included such regulatory activities as rate and accounting surveillance, rate filings and corporate applications, and formal proceedings. *Hearings on Appropriations for Fiscal 1971 for Independent Offices and Dept. of HUD Before a Subcommittee of the House Committee on Appropriations*, 91st Cong., 2d Sess. 947, 966 (1970).

C. The Government asserts (Br. 9):

> "In its order establishing the annual charges the Commission identified the benefits accruing to utilities and natural gas companies from the administration of Parts II and III of the Federal Power Act and the Natural Gas Act. With respect to electric utilities, the Commission referred to the impact of its coordination and reliability programs on the stability and operations of the electric industry (Pet. App. 30a)."

The cited portion of the Commission's order does not discuss the Commission's "coordination and reliability programs", and NEPCO respectfully asserts that the Commission order did not even define its "coordination and reliability programs", much less "identify" any alleged benefits.

SUMMARY OF ARGUMENT

Under Part I of the Federal Power Act (originally the Federal Water Power Act of 1920) the Federal Power Commission exercises comprehensive licensing authority over non-Federal hydroelectric power projects utilizing the federally-owned lands or navigable waterways of the United States. Licensees under that Act enjoy rights to the use of the lands or waters involved for power generation purposes and are required by section 10(e), 16 U.S.C. § 803(e), to pay annual charges to reimburse the Government for the FPC's costs of administering that licensing program. Title II of the Public Utility Act of 1935 established the Federal Power Act and under Parts II and III, among other matters, conferred on the FPC jurisdiction over electric utilities in areas which Congress

felt were beyond the powers of the states to regulate because they involved interstate commerce. At that time Congress deliberately chose not to extend the total cost recoupment principle of section 10(e) to parts II and III of the Act, although it did expressly authorize the Commission to make reasonable charges for its publications and for "special and periodic services". 16 U.S.C. § 825k.

In 1951, as a result of its desire to implement a consistent policy for assessing "user charges" on "special beneficiaries" of various federal programs, Congress enacted Title V of the Independent Offices Appropriations Act for 1952, authorizing all federal agencies to assess "fair and equitable" fees in connection with any "work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility" furnished any person. A savings clause provided that Title V was not intended to "repeal or modify existing statutes prohibiting the collection . . . of any fee, charge or price".

New England Power Company contends that the Federal Power Act (1) must be construed to prohibit the charging of fees to recover the FPC's costs for all of its regulatory and non-regulatory programs under parts II and III of the Federal Power Act,[6] (2) is therefore not superseded by Title V, whatever that later Act's scope, and (3) consequently, the FPC's

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[6] By non-regulatory program costs NEPCO means those costs associated with general Commission investigations, studies and other activities other than those for which filing fees are assessed, and which are generally described in the Commission's budget as "Electric Power Industry Systems Evaluation". See n.5 *supra*.

proposed annual assessments on public utilities to recover its costs of administering parts II and III, other than those associated with special applications or filings of individual utilities, were properly invalidated by the court of appeals.

Even if the 1935 act is not construed so as to bar the disputed assessments, Title V does not confer the broad authority sought by the Government. The general administration of Parts II and III of the Federal Power Act does not constitute a "benefit" to electric utilities, either individually or as a class, for which a fee may be charged within the meaning of Title V. Rather, the relevant hearings, committee report, and floor debate make it clear that Congress intended only to authorize the imposition of fees on "special beneficiaries" of federal activities to recover a fair portion of the costs associated with such activities. The limited purpose of Title V has consistently been recognized by the Bureau of the Budget in carrying out the President's responsibility to establish a uniform policy for implementing the fee-setting authority. The basic guidelines are set forth in Bureau of the Budget Circular A-25 of 1959, and apply to "all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large." They direct that "a reasonable . . . charge should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit." The court below correctly held that the Commission's alleged creation of a favorable "economic climate" for the electric utility industry cannot be squeezed within the kind of "special benefit" con-

templated by Title V and Circular A-25, even if such an "economic climate" could be (1) ascertained and (2) judged to be beneficial to some degree.

The narrow scope of Title V has consistently been recognized by all federal agencies, including the FPC until the present controversy, and they have limited its application almost uniformly to the assessment of filing and license fees, or to various annual levies on holders of a variety of licenses, certificates of convenience and necessity, or similar authorizations.

ARGUMENT

Title V of the Independent Offices Appropriations Act for 1952 Does Not Authorize the Annual Assessments on Electric Utilities Proposed by the Federal Power Commission

I. THE FEDERAL POWER ACT PRECLUDES THE FPC FROM ASSESSING CHARGES FOR THE GENERAL ADMINISTRATION OF PARTS II AND III AND WAS NOT SUPERSEDED BY TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT FOR 1952.

Part I of the Federal Power Act contains the Commission's hydroelectric project licensing authority, originally enacted in 1920. Section 10(e) of the Act (16 U.S.C. § 803(e)) provides that costs of administering that part of the statute shall be recouped from the holders of the licenses issued thereunder, directing that "the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purposes of reimbursing the United States for the costs of administration of this Part." Limited regulatory responsibilities over electric utilities were given to the Commission in 1935 by the Public Utility Act of 1935 and denominated Parts

II and III of the Federal Power Act.[7] However, even though Congress was fully aware of the purpose of and experience under section 10(e), it deliberately decided against extending its application to Parts II and III. Thus the Senate Committee explained its restrictive amendment to section 10(e) as follows:[8]

> "Several minor changes are made in section 10(e), relating to charges to be paid by licensees. The charge to be fixed by the Commission for the purpose of reimbursing the United States for the cost of administration is limited to the cost of administering this part of the act, instead of the entire act. This makes no change in the present situation, but confines the charges to those needed for the administration of the water power provisions."

Although Congress took pains to provide that the kind of total program cost recoupment authorized for licensing functions in section 10(e) was not to be applied to parts II and III, section 312 of the Act expressly authorized the Commission to sell its publications at "reasonable prices" and "to make such charges as it deems reasonable for special statistical services and other special or periodic services." 16 U.S.C. § 825k.

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[7] Part I of the Federal Power Act was originally enacted as the Federal Water Power Act of 1920 (41 Stat. 1062). By Title II of the Public Utility Act of 1935 (49 Stat. 838), that Act was made Part I of the Federal Power Act and Parts II and III added. (16 U.S.C. § 791a, *et seq.*) Part II vests in the Commission jurisdiction over the transmission of electric energy in interstate commerce and the sale of electric energy in interstate commerce by public utilities. Part III carries the administrative and procedural provisions of the Federal Power Act.

[8] S. Rep. No. 621, 74th Cong., 1st Sess. 45 (1935). *Accord*, H.R. Rep. No. 1318, 74th Cong., 1st Sess. 24 (1935).

Consequently, the legislative history of the 1935 Act reinforces the *expressio unius, exclusio alterius* rule of statutory construction to make it clear that Congress deliberately withheld authority from the FPC to make its programs under Parts II and III of the Federal Power Act fully self-sustaining through the imposition of annual fees or charges.

The court below recognized that it was "highly significant" that Congress expressly chose not to make the principle of section 10(e) applicable to parts II and III of the Federal Power Act. (Pet. App. 13a). The Government, however, asserts that Congress' action in 1935 "has no significant bearing on the issue here, since Title V expressly authorizes the imposition of fees and charges and was obviously intended to provide for charges where no such authorization previously existed". (Br. 23). This superficial analysis ignores the savings clause in Title V providing that "nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price", which the committee report on the bill explained meant that Title V "would authorize and encourage the charging or increasing of fees to the extent *permitted under present basic laws*".[9] Although the Public Utility Act of 1935 did not incorporate an express prohibition against the kind of charges proposed by the FPC, the Federal Power Act clearly must be construed to prohibit such charges and is therefore unaffected by Title V.

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[9] H.R. Rep. No. 384, 82nd Cong., 1st Sess. 2 (1951) (emphasis added).

II. THE GENERAL ADMINISTRATION OF PARTS II AND III OF THE FEDERAL POWER ACT DOES NOT CONSTITUTE THE CONFERRING OF A "BENEFIT" ON THE ELECTRIC UTILITY INDUSTRY WITHIN THE MEANING OF TITLE V

Title V of the Independent Offices Appropriations Act for 1952 provides, in pertinent part, as follows (31 U.S.C. § 483a):

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses) . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized . . . to prescribe therefor such fee, charge or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served and other pertinent facts . . .

The annual charges proposed by the Commission and invalidated by the court below are not assessed in connection with the grant by the Commission of a "privilege", "franchise", "license", "permit", "certificate", or "use of federal property", since the Commission exercises no formal licensing or certification authority under Parts II and III of the Federal Power Act. The act does not even require electric utilities to obtain a certificate of convenience and necessity to construct and operate interstate transmission facilities, in contrast to the regulatory requirements for interstate natural gas pipelines under the Natural Gas Act.

With respect to filings and applications made pursuant to the requirements of Parts II and III of the Act which invoke the exercise of Commission regulatory "authority", the resulting Commission activity in response thereto may arguably be considered "work" or "service" providing a special "benefit" to the filing utility over and above the Commission's overall administration of the statute on behalf of the general public. There is no dispute as to the authority of the Commission to make such charges.[10]

The annual charges which were invalidated by the court below are of a distinctly different character from the substantial filing fees which are now in effect, in that they purport to cover costs under Parts II and III which cannot reasonably be assigned to particular "work" or "service" for the "benefit" of any specific utility. Thus, as the court below noted, they are indiscriminately imposed on many utilities "despite the fact that they had no proceedings before the Commission for that year." (Pet. App. 9a).

Thus, the issue is not, as the Commission abstractly and rhetorically states it, whether the Commission may lawfully "recoup a portion of its cost of administering the Federal Power Act . . . through the imposition of annual fees on companies subject to its jur-

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[10] Although the propriety of the filing fees established by the Commission in connection with rate schedule filings under section 205 of the Act is a borderline case with respect to the scope of Title V since the Commission's rate regulatory authority is primarily for the benefit of the general consuming public, NEPCO chose not to contest the validity of those fees below inasmuch as such filings do generate Commission "work" necessitated solely by the initiating action of the filing utility. The filing fees range from $100 to $5000 for various applications and from $100 to in excess of $55,000 for rate increase filings. R. 213-16.

isdiction after taking into the consideration the benefits such companies receive from Commission regulation". (Pet. Br. 2). Rather, the question is whether such fees are reasonably related to identifiable benefits, if any, conferred on particular utilities and, if so, whether they are the kind of special benefits for which a fee is authorized under Title V.

The Government argues that there is nothing improper in an annual assessment, *per se,* as a means of recouping costs under the authority conferred by Title V. (Br. 14-15). That is not the issue before the Court. NEPCO does not contend and the court below did not hold that an "annual charge" might not be an appropriate way to assess charges for any "work" or "service" conferring a special benefit on an identifiable beneficiary. It is not the label or timing of the fee that is here at issue, but whether there is a sufficient nexus between such a fee and a measurable special benefit for which Congress intended a fee to be assessed. The critical question as to the authority for its imposition is whether it is grounded on Commission activity initiated by a utility's filing invoking the provisions of parts II and III of the Federal Power Act, so as to justify characterization as a "benefit" within the meaning of Title V and a "special benefit" within the meaning of Bureau of the Budget Circular No. A-25, on which the Commission relies.

The vice of the annual charge invalidated by the court below is that it does not in fact relate to any such special benefit. Rather, it is an attempt to recoup the total cost of the FPC under Parts II and III of the Federal Power Act, no matter what activities the FPC elects to undertake under its broad authority (other than certain undefined and essenti-

ally unknown costs associated with service to federal, cooperative and municipally-owned utilities not subject to FPC jurisdiction)[11] less those costs already covered by the uncontested filing fees.

With respect to the proposed annual assessments, the Commission's notice of proposed rulemaking stated (R. 6):

> We have also proposed a formula to recoup the remaining costs of our regulatory program and those incurred in the administration of reliability functions by assessments based on revenues as reasonably representative of the values of those services to such companies. We believe our activities in both areas of our operations provide special benefits to the companies subject to our jurisdiction that fully justify the scale of charges we propose to initiate.

The notice did not identify the "special benefits" referred to.

The Commission's Order No. 427 of March 18, 1971, asserted that its general regulatory and reliability programs "both have direct and substantial impact on the stability and operations of public utilities" and it rejected the contention that the costs of such pro-

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[11] Section 201(f), 16 U.S.C. § 824(f), excludes from Part II jurisdiction the United States, a State or any political subdivision thereof and related instrumentalities. The Commission has held further that Part II does not apply to entities organized as cooperatives. Dairyland Power Cooperative, 37 FPC 12 (1967). To the extent that a portion of the annual costs can be assigned to work connected with such systems, no assessment will be made against those systems, and jurisdictional utilities will not have to pick up such costs (R. 213). The Commission did not indicate, however, how it would allocate costs between jurisdictional and nonjurisdictional utilities.

grams should properly be borne by the general taxpaying public (R. 205-06, emphasis added):

> The creation of regulatory agencies at the federal level and the exercise of the powers delegated by the Congress to them have provided the foundation for the sound financial condition which public utilities and natural gas companies have achieved. We recognize that the exercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial has provided continuing benefit to consumers, but our actions in this respect have redounded to the benefits of both industries *by creating the economic climate for greater usage of the services of the regulated companies* which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. [Footnotes omitted]

The court of appeals rejected that justification for the annual assessments, holding that "creation of an 'economic climate' is not a 'special service' " and that "the contemplated charges would have no relation to specific services or benefits rendered." (Pet. App. 9a). It concluded that "the regulation of these industries is primarily for the benefit of the public" and that "in the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefiting the general public should come from the general fund of the treasury." [12] The court's practical, common sense construction of

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[12] Pet. App. 10a. Since Title V is a revenue raising measure, it is to be construed strictly so as to resolve any doubts against the Government. *U.S.* v. *Merriam*, 263 U.S. 179, 187 (1923); *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 560 (1932).

the section recognizes that Congress would not have left to the courts the difficult task to determine on a case-by-case, agency-by-agency basis whether the "economic climate" created by the programs administered by scores of federal regulatory and executive agencies was "beneficial" rather than "adverse", so as to justify requiring any identifiable beneficiaries to bear the full cost of such public programs. Congress obviously intended no such amorphous test for the applicability of Title V, and the Government cites not a shred of evidence from the legislative record to support the FPC's strained rationale. The opinion of the court below, on the other hand, comports fully with the narrower legislative purpose of Title V, as well as its administrative construction by the Bureau of the Budget, the FPC, and other federal agencies, to which we now turn.

III. THE LEGISLATIVE HISTORY OF TITLE V CONCLUSIVELY SUSTAINS THE DECISION OF THE COURT OF APPEALS

The appropriate starting point in the legislative history of Title V is the study carried out by the Senate Committee on Expenditures in the Executive Departments in 1950 which resulted in Senate Report No. 2120, 81st Cong., 2d Sess., entitled "Fees For Special Services". The question considered was "the practicability and propriety of establishing fees for services which the Federal Government renders to special interests," and the Committee's focus was described as follows (*Id.* at 1, emphasis added):

> The committee's approach, therefore, is not from a revenue-raising perspective, but is rather with the view of determining the feasibility of offsetting items now necessarily included in the

> Federal budget as nonreimbursable by transferring the financial burden thereof to the *special beneficiaries.* Thus, at the outset, it is desired to draw a clear line of distinction between services which the Federal Government renders, either upon request or by law, to special interests to which benefits thereby accrue at the expense of all the taxpayers, and services for which the Government is inherently liable and the benefits of which accrue to the people at large.

This theme was reiterated later in the report (*Id.* at 3, emphasis added):

> There has been no quarrel with the philosophy governing the study that those who receive the benefit of services rendered by the Government *especially for them* should pay the costs thereof. In the several staff reports and press releases which have been issued, occasion has been taken to reiterate that philosophy and to give reassurance that there is no thought here to establish a system of fees for fundamental Government services, but only to explore the feasibility and fairness of shifting to *special beneficiaries* the expense now being borne for them by the taxpayers at large.

The other dominant theme was that the substantive Congressional committees should assume the principal burden of studying the user charge practices of the agencies within their respective jurisdictions and initiate appropriate legislative proposals (*Id.*):

> At the outset, there had been considered the possibility that this committee itself would cause the drafting and introduction of appropriate general legislation to bring about the desired ends. The study, has, however, demonstrated clearly that the field is far too broad to be covered by general

> legislation; it must instead, if practical results are to be obtained, be covered by individual acts of Congress drafted by specialists in special fields. This report should provide a useful guide to the standing committees of the Congress having such jurisdictional authority.

The report contained a summary of the user fee reports from various agencies, including the following commentary on the FPC:[13]

> The committee recommends consideration of the several licensing functions of this agency. Fees are now charged pursuant to law to licensees under Part I of the Federal Power Act. The Commission also issues certificates of public convenience and necessity to natural-gas companies under the Natural Gas Act and administers certain regulations under part II of the Federal Power Act. The Federal Power Commission suggests that the imposition of levies upon the gross revenue of regulated enterprises would be an equitable method of recovery of related costs.

The Committee's concern only with fees related to the licensing functions of the Commission, as opposed to its overall regulatory and administrative activities, reflected the generally narrow area of user charge concern which was to carry over into the next Congress and result in the enactment of Title V of the Independent Offices Appropriations Act for 1952.

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[13] *Id.* at 12. The Government relies on the last sentence of the paragraph as purportedly supporting the propriety of the annual assessments invalidated below. (Br. 23-24). However, that sentence is ambiguous at best. Not only is it a staff paraphrase of the FPC report, but it is not clear whether the suggestion related to Part II of the Federal Power Act as well as to the Natural Gas Act. In any event, the purported FPC suggestion concerned only a possible fee formula, not the kind of activity for which fees might reasonably be charged, which is the issue here.

The Committee then requested the Bureau of the Budget to complete the staff studies, and that general approach to further review of the problem was approved by the House Ways and Means Committee on December 30, 1950.[14] It was against that backdrop of a Congressionally initiated review of federal agency user fee practices, looking to further action on necessary legislative authorization by the substantive Congressional committees with respect to the agencies within their jurisdiction, that Title V was enacted.

Title V originated as a rider to H.R. 3380, which contained appropriations for federal independent offices for fiscal 1952 and was reported by the House Committee on Appropriations. Its genesis was the concern expressed by the members of the committee during the hearings in early 1951 [15] that a portion of the burgeoning costs of the Federal Government be recouped from special beneficiaries of various federal programs, the same concern reflected in the Senate study and report in the previous session, *supra*. Chairman Thomas and Rep. Yates, who was later to offer the only explanation made in either the House or the Senate of the purpose of Title V, took the lead in questioning each federal agency witness about his agency's fee policy. Two themes predominate in the hearings, both of which are fatal to the Government's

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[14] The Bureau of the Budget review was initiated the following year and is discussed *infra* at pp. 31-32. Subsequent Bureau and Congressional action on the user fee study through 1956 is detailed in S. Rep. No. 1467, 84th Cong., 2d Sess. (1956).

[15] *Hearings Before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1952*, 82nd Cong., 1st Sess. (1951).

construction of Title V and fully confirm the interpretation of the court below: (1) the committee was solely concerned with assessing fees relating to specific services, largely of the licensing category; and (2) there were repeated expressions that an agency's fees for such services ought to cover a portion of its associated administrative costs, but not a hint that entire agency programs ought to be made completely self-sustaining through assessments on individual users or the entire industries regulated.

The foregoing themes were highlighted early in the hearings by Rep. Yates' questions to the witnesses from the Interstate Commerce Commission:[16]

> *Mr. Yates.* I am a newcomer to this committee, but as I sat here I noticed practically all of the requests of the various agencies were for additional funds. The thought struck me as we have gone through this appropriation table today as to why the carriers under supervision should not pay a portion of the regulatory cost. . . . I know the States and municipalities, when they inspect passenger elevators, for instance, under their police powers, charge a license fee which in a measure meets the necessary cost of inspection. Why would not a charge be feasible to recapture some of the cost of the Commission?
>
> *Mr. Mahaffie.* It would be entirely feasible, as I see it. . . . .
>
> *Mr. Yates.* With respect to applications, for a certificate of convenience and necessity, are there any charges made?
>
> *Mr. Mahaffie.* None whatever, no matter if the hearing runs to 10,000 pages . . . .
>
> *Mr. Yates.* Would it be feasible, in your opinion, to make any sort of a charge for filing, or

[16] *Id.* at 281.

any other fees predicated upon this grant which, after all, is a grant under a theory of a regulated monopoly and is of value to the carrier?

Mr. Mahaffie. It would be entirely feasible, so far as I can see.

Rep. Yates reiterated to other agency witnesses his concern that a portion of the regulatory agencies' costs should be recouped from licensees and other applicants for special services. Witnesses for the Federal Communications Commission and the Securities and Exchange Commission explained that proposals for such fees had never been popular in Congress and would undoubtedly engender strong opposition:

[Federal Communications Commission][17]

Mr. Yates. Has the Commission given consideration to the possibility of imposing a charge for its services?

Mr. Plotkin. That has been before the Congress on several occasions. It has never been popular and it has never passed the Congress. It has been before the Legislative Committee.

Mr. Walker. We took that up as far back as 1934, when the Commission was first organized. But we have never gotten anywhere with it.

Mr. Yates. When you say you took it up, what did you do? Did you make a proposal that a charge be made for granting a certificate, or on filing an application? . . .

Mr. Plotkin. There was a study in 1940. There is an interdepartmental committee studying it for the Bureau of the Budget now.

Mr. Yates. Is a copy of that study available? I think with the costs of administration going

[17] *Id.* at 524.

up and up perhaps some of the costs should be borne by the applicants.

[Securities and Exchange Commission][18]

Mr. Yates. Do you charge any fees for registration of brokers?

Mr. Riordan. No, sir.

Mr. Yates. Would that not be a feasible fee-charging function? . . .

Mr. McDonald. I will answer that question, if you don't mind. Having been a broker-dealer, I can tell you there would be a great wail. . . .

Mr. Yates. You have about four or five thousand registered broker-dealers; is that true?

Mr. Riordan. That is right.

Mr. Yates. You don't think any portion of the cost of the regulation would be feasible to be charged against these people?

Mr. McDonald. That could be done by statute, but I would say you would run into terrific opposition.

Mr. Yates. What possibilities for obtaining fees are there besides the ones you already charge which might compensate in measure for the cost of regulation?

Mr. McDonald. You can't charge people for prosecuting them, and a great part of our work is the prosecution of brokers who have committed violations. . . .

Mr. Yates. Why not?

Mr. McDonald. Suppose you inspected one fellow as many as three of four time a year. I don't think it would be feasible to charge a man because you were suspicious of him.

Mr. Thomas. In other words, you are not rendering him a service by inspecting him?

Mr. McDonald. That is right. . . .

Mr. Yates. Isn't this a service which is necessary from the public viewpoint and which is

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[18] *Id.* at 727-28, 730.

really beneficial as well to the broker-dealers in that it does provide a means of policing those who are not living up to certain standards?

Mr. McDonald. That would be invoking a different philosophy than is generally followed. Where you inspect a person for violations which might be criminal, where there might be a broker-dealer revocation, or possibly a criminal reference, it would seem to me not to be feasible to charge a fee.

The questioning of the Federal Power Commission witnesses by Chairman Thomas and Rep. Yates is particularly instructive. There was explicit recognition that the Commission only charged fees of licensees in connection with its hydroelectric project licensing responsibilities under Part I of the Act, in accordance with the mandate of section 10(e). The Committee focused primarily on the propriety of charging a licensing fee for pipeline certificates of public convenience and necessity under the Natural Gas Act, as had the Senate Committee on Expenditures in the Executive Departments in the previous Congress (*supra*, p. 20):[19]

Mr. Thomas. You only charge fees under the Federal Power Act, to be accurate about it; isn't that right?

Mr. Sechrest. Yes.

Mr. Thomas. You don't charge fees for your licensing of natural gas?

Mr. Sechrest. No.

Mr. Thomas. Isn't that a field for fees?

Mr. Wallgren. It certainly is.

Mr. Thomas. Is there any good reason why you shouldn't collect fees to help defray the

[19] *Id.* at 681.

> expenses of the activities of the Commission dealing with the regulation and granting of licenses of natural gas lines the same as you do for the licensing of electric-power installations?
>
> *Mr. Wallgren.* I think we should collect fees.

Rep. Yates, who was the most militant spokesman on behalf of increased fees and was familiar with public utility regulation, having served on the Illinois public utility commission,[20] went no further than to suggest the possibility of charging fees in connection with FPC authorization of certain security issues by electric utilities pursuant to section 204 of the Act:[21]

> *Mr. Yates.* What about the question of securities? Do any of your licensees under this part [I] of the act ever refinance or come in for additional issues of securities?
>
> *Mr. Charles W. Smith.* Yes; but the Commission has limitations on its jurisdiction over securities.
>
> *Mr. Yates.* Is it not feasible to make a charge for your investigation into the propriety of the security issue?
>
> *Mr. Charles W. Smith.* Yes, that could be done.

The House Committee report clearly showed that the purpose of Title V was simply to encourage Federal agencies to establish or increase fees for services rendered to special beneficiaries pending the completion of Congressional studies on the subject of fees

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[20] *Hearings Before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1954*, 83rd Cong., 1st Sess. 176 (1953).

[21] *Hearings on 1952 Appropriations*, n. 15 *supra* at 689.

and the eventual enactment of necessary amendatory legislation:[22]

> The Committee is concerned that the Government is not receiving full return from many of the *services which it renders to special beneficiaries.*
>
> . . .
>
> It is understood that other committees of the Congress have interested themselves in this matter and that studies now are underway which may result in further legislation to require that adequate consideration be received for such services. However, such studies are necessarily time-consuming and the required legislation may not be enacted for a considerable period. Accordingly, the Committee has inserted language in the bill (Title V, p. 60) which would authorize and encourage the charging or increasing of fees *to the extent permitted under present basic laws* but which would in no way conflict with studies now underway to effect changes in such basic laws.
>
> It is estimated that in 1952 the Government will receive more than $300,000,000 in fees from sources of the type here under consideration. It seems entirely possible that many of these fees could be raised, and that *fees could be charged for other services of similar types* in cases where no charge is now made, to the extent that the Government might realize upwards of $50,000,000 additional revenue.
>
> The bill would provide authority for Government agencies to make charges for these services in cases where no charge is made at present, and to revise charges when present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made.

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[22] H.R. Rep. No. 384, 82nd Cong., 1st Sess. 2 (1951) (Emphasis added.)

The only discussion of Title V during the debates on the bill was by Representative Yates, who offered the following explanation:[23]

> "For the first time, our subcommittee went into a new question, the question as to whether or not there should be charges and fees made by regulatory agencies of the Government *for many of the services* which they render to those who come within their jurisdiction. . . . As an example, I cite the Federal Communications Commission. The Federal Communications Commission grants *franchises, licenses, certificates of convenience and necessity* if you will, to all broadcasting stations upon application for such licenses, franchises and certificates. The Commission undertakes extensive hearings first in connection with a construction permit; secondly on the question as to the allocation of the position of a particular broadcaster in the spectrum of megacycles over which the Federal Communications Commission has control. That is a pretty difficult job and a complicated job, and entails extensive hearings by the Federal Communications Commission. The taxpayers pay every dollar of the charges and of the costs that go into that hearing. The companies pay nothing, other than taxes, and I think it is only fair that in exchange for the *franchise* that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, that it should pay *some of the costs* of the hearing. It is perfectly proper that the franchised company make a profit and there has been much profit making. Such companies should assume a *greater share of the costs,* because regulation is neces-

[23] 97 Cong. Rec. 4809 (1951) (Emphasis added).

sary. I think also that the Government should be able to recapture *some of the costs* that go into the hearings of the other regulatory agencies. Such fees are appropriate for many of the hearings which take place before the Interstate Commerce Commission. I know that in my home city of Chicago the city requires the owner of every building which operates a passenger elevator to obtain a license for that elevator, and in order to recoup the costs for inspection in such licensing it required a rather nominal licensing fee."

"The Interstate Commerce Commission is required to inspect locomotives of railroads, safety appliances, signaling systems, various facilities of that type. The Government pays every cent for this operation. In addition to that, much of the work of the Interstate Commerce Commission is involved with hearings on *applications for certificates of convenience and necessity* for bus lines and other common carriers. The Government assumes the complete cost of such hearings in spite of the fact that here again it grants a franchise which is very valuable to the company making the application and in the operation of which franchise it is protected from competition."

"Each of the Commissioners who appeared before us was asked his opinion as to whether or not it was feasible to charge *for a portion of the operations* of the agency and in each event the Commission thought that it would be practicable. Not only that, one Commissioner expressed the viewpoint that such a practice would not only be feasible but would deter and do away with many superfluous applications. Therefore, the subcommittee in its deliberations decided to put a new legislative section into the bill which would permit each of the agencies to appraise its own operations to see whether or not it would be possible to recapture for the Government *some of*

the costs that the Government incurs in connection with this regulation through the establishment of a schedule of fees."

The specific examples of services cited by Representative Yates reinforce the clear thrust of the hearings that Title V was intended merely to authorize fees for particular licensing-type services in order to recover a portion of agency expenses, and not to sanction an annual charge system for recovering an agency's total cost. Moreover, to read Title V as authorizing an agency to recoup the total cost of its programs renders surplusage the Congressional direction that fees charged under Title V shall "be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts". The specification of guidelines for setting the level of fees was a useless exercise by Congress if in fact it had already authorized regulatory agencies to assess the total cost of their programs on the regulated industries without regard to the factors listed.

H.R. 3880 was passed by the House without any further discussion or amendment of Title V. The section was not discussed in either the Senate hearings or debates, and it was passed by the Senate without amendment. It must be assumed that Title V was enacted with such minimal consideration by both houses only because of reliance by Congress on the explanation given in the House committee's report and by Rep. Yates as to its limited scope. It is inconceivable that Title V would have passed without debate or dissent if in fact it was effecting the radical revolution in the funding of the total programs of all federal agencies which the Government now argues for. As

agency witnesses testified during the House hearings, Congress had earlier resisted the imposition of even modest fees by regulatory agencies. (*Supra*, pp. 23-24) And, as we have shown, Congress had taken pains in 1935 to deny the very authority to recover the costs of administration of parts II and III of the Federal Power Act which the Government now contends was conferred obliquely by Title V. It was a Congressional desire not to disrupt existing statutory fee-setting provisions or to preempt the prerogatives of the substantive committees interested in the problem which prompted the savings clauses in Title V, as the committee report and Rep. Yates made clear.

IV. THE BUREAU OF BUDGET'S CONSISTENT CONSTRUCTION OF TITLE V SUPPORTS THE INTERPRETATION OF THE COURT BELOW

Title V provides that agency fees "shall be as uniform as practicable and subject to such policies as the President may prescribe." Implementation of that directive was carried out by the Bureau of the Budget (now the Office of Management and Budget), and hence its construction of Title V is significant. The Budget Bureau has consistently construed Title V as dealing with what has come to be known in shorthand as "user charges," a characterization which reinforces the legislative history of the section and which confirms the decision below.

On May 21, 1951, the Bureau of the Budget circulated to the heads of all executive departments and agencies Bulletin No. 51-13, dealing with "charges for Government services and products." (Appendix A hereto). It detailed Congressional concern about the subject, including the House Committee's report on

Title V, and described the purpose of the accompanying questionnaire (p. 2):

> The questionnaire covers all goods and services which are of direct benefit to limited groups of individuals, businesses, and other organizations. Services which are provided to identifiable individuals, business, or other organizations should be reported even though they are also indirectly of benefit to the general public.

The kinds of goods and services which were to be reported on included "(1) Coinage services, (2) Permits, licenses, and other registration services, (3) Use of money (through loan and advances), (4) Use of property, (5) Leases for obtaining minerals, oil, gas, etc., (6) Use of patents, copyrights, etc., (7) Other products provided, [and] (8) Other services provided." *Id.* In the sample questionnaire attached to the bulletin, illustrations of "other services provided" were "testing oil filters, statistical tabulations, and market news services".

On November 5, 1953, the Budget Bureau issued Circular A-25 as a guide to implementation of Title V. The 1953 circular dealt with "fees for licensing, registration, and related activites", and it is clear from that circular that "related activities" did not encompass fees to recover the overall costs for administration of an agency's non-licensing functions such as were contemplated under the annual charges invalidated below.

A major revision in the Bureau of the Budget's program occurred in 1957 when the Bureau issued Bulletin No. 58-3 (November 13, 1957) superseding Circular A-25. (Appendix B hereto). It was

captioned "User charges for certain Government services" and was the result of what the Director of the Budget characterized as "a careful and thorough joint interdepartmental review of the problem." (p. 1). That study and report, attached as an appendix to Bulletin No. 58-3, recognized that "among the numerous services performed by the Federal Government in the public interest, many provide an *added special benefit* to individuals or groups." (p. I-6, emphasis added). The report also makes it quite clear that the Bureau of the Budget did not consider that the general regulatory activities of the Federal Power Commission, or any other federal agency, constituted the conferring of "special benefits" on the regulated parties within the meaning of Title V. Thus the coverage of what was described as "an overall review of agency user charge practices" conspicuously omitted any survey of the general regulatory activities of the independent regulatory agencies (*id.*):

> *Joint interagency study*
>
> To achieve the above objective, the President requested that several executive agencies join together to study the problem involved and make any necessary recommendations to him. In the resulting report an overall review of agency user charge practices has been made and recommendations have been developed with respect to (1) general policies governing charges, (2) specific standards and criteria to be used in determining fees, and (3) measures for implementing a positive user charge program.
>
> *Coverage*
>
> The scope of the study was Government-wide in its application, but the study itself covered only a selected number of agencies and operations

within those agencies. The activities examined on a sample basis included: licensing; testing, inspection and grading; use of air and water navigation aids and facilities; use of money and credit; publications; maps, charts, and aerial photographs; special studies, recreation and tourist facilities; grazing; oil, gas, and mineral leasing and mining claims; miscellaneous land uses; and use of Government-owned patents. Selected operations which reflect the major non-Federal users or beneficiaries within each of these general activities were examined.

Regulatory agencies are mentioned only in the context of their licensing responsibilities (*id.* at I-7):

1. In the licensing activity, the charges range from zero to 100 percent of the costs. No charge, for example, is made for the issuance of Federal Communications Commission and Interstate Commerce Commission regulatory licenses. On the other hand, the regulatory operation concerned with the national banks by the Comptroller of Currency is self-sustaining, and the issuance of patents and the registration of trademarks by the Patent Office is approximately 45 percent self-sustaining. Within the Federal Power Commission, the licensing of utility company hydroelectric power facilities is nearly self-sustaining, while a comparable license in the natural gas field is provided free.

It is inconceivable that the Bureau of the Budget, notoriously aggressive in urging maximum utilization of user fees, would not have directed an inquiry into the feasibility of levying fees to recover the total general administrative costs of the regulatory agencies had it thought Title V authorized the imposition of such annual charges.

The study included specific recommendations "to the solution of the user charge problem" which, with minor modifications, became revised Circular No. A-25 issued September 23, 1959. (Appendix C hereto). Consistent with the legislative history of Title V, the circular applies to "all Federal activities which convey *special benefits to recipients above and beyond those accruing to the public at large*" and declares as general policy that "a reasonable charge . . . should be made to each *identifiable recipient* for a *measurable unit or amount of Government service* or property from which he derives a *special benefit.*" (p. 1, emphasis added).

While both the statement of coverage and the declaration of policy arguably encompass individual utilities which initiate or invoke Commission "service" in connection with particular applications or other filings, neither statement can be tortured to include the kind of general administrative and program activity under parts II and III of the Federal Power Act to which the disputed annual assessments relate.

It strains reason to equate the FPC's general program activities under parts II and III with "activities which convey special benefits to [electric utilities] above and beyond those accruing to the public at large", or to accept that the total costs of such general programs constitute "a measurable unit or amount of Government service" from which utilities derive a "special benefit". The Government brief, as did the Commission below, ignores the critical issue of identifying any "special benefit", and dwells on the question of whether the entire electric utility industry, as opposed to individual utilities, may properly be con-

sidered an "identifiable recipient". But that is hardly the central issue, since it is obvious that if each year every electric utility availed itself of Commission services conferring "special benefits . . . above and beyond those accruing to the public at large" there would be no vice in assessing some sort of annual charges on the "entire" industry, although the magnitude and allocation of such charges among industry members would remain of paramount concern. But that is not the case under parts II and III of the Federal Power Act. Many utilities never invoke FPC action in a given year, or indeed for many years, and when they do they pay the specified filing fees. Thus the validity of the disputed charges turns not on some abstract distinction between the whole industry and its constituent members (either of which are readily "identifiable"), but whether electric utilities, either individually or as a class, may be obligated to support the Commission's far ranging activities under parts II and III even though they receive no "special benefits" from such activities.

Indeed, the proposed annual assessments to recoup the Commission's costs of general activities under Parts II and III of the Federal Power Act appear to fall squarely within the express prohibtion of section 3a(2) of the circular:

> No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public (e.g., licensing of new biological products).

This prohibtion conforms to the original guidelines for the determination as to when user charges would

be appropriate which were suggested by the Senate committee in 1950:[24]

> The committee does not herein aline itself for or against the assessment of fees. Such a decision can prudently be made only after full and exhaustive hearings. There is no doubt, however, that of the 12 agencies included in this study, some render services the benefits of which accrue *wholly* to special interests which derive therefrom the means of financial success. The committee does incline to the view that, *in such instances,* the cost to which the Government is put should be borne by the beneficiaries. Where there is joint benefit to a particular beneficiary and to all of the people, the cost should be equitably divided, *and where there is doubt as to the degree or preponderance of benefit, there should be no fee.*

Circular A-25 carefully describes the kind of "Special Services" for which charges should be made as follows (section 3):

a. *Special Services*

(1) Where a service (or privilege) provides benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue

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[24] S. Rep. No. 2120, 81st Cong., 2nd Sess. 3-4 (1950) (emphasis added).

to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group or the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

The examples cited by the Bureau of the Budget significantly reflect the same limited concept of "special benefits" with which Congress was concerned and on which the Budget Bureau's user charge study had focused since 1951. They all involve either personalized service initiated at the request of an individual member of the public or the issuance of a formal "authorization", e.g. patents, licenses and certificates of convenience and necessity. Nowhere is there the slightest hint of the expansive authority sought by the Commission.

The Government argues that the FPC's general program, over and above the specific services for which it already collects filing fees, comes within the definition in section 3a(1)(b) on the ground that it "provides business stability or assures public confidence in the business activity of the beneficiary". (Br. 17). Leaving to one side the temptation to examine whether the FPC's general programs can reasonably be argued to

have produced "business stability" or promoted "public confidence" in the electric utility industry, the Government's argument can only be made remotely plausible by the Procrustean deletion of the illustrative examples used by the Bureau of the Budget to provide some points of reference for the general guidelines of the circular. The circular's guidelines cannot be read in such an artificial vacuum.

The Government attempts to buttress its reliance on section 3a(1)(b) by citing a utility textbook author's assertion "that the stringent accounting regulation enforced by the FPC was *not only* in the public interest, *but also* in the best interest of the operating companies concerned". (Br. 17-18, emphasis added). Similarly, the Government asserts that "the Commission's reliability and coordination programs enhance the ability of the electric utility companies to meet peak requirements with minimum generating capacity, and help ensure public confidence in the industry's ability to satisfy total demand." (Br. 19). Two points need be made about such assertions. First, neither assertion has any basis in the record of the rulemaking proceedings below, nor were the alleged illustrative benefits relied on by the Commission. Indeed, as we have pointed out, the Commission's "reliability and coordination programs" have never been defined, let alone a link established between them and the economic health of the electric utility industry generally. It is axiomatic that Government counsel cannot supply *ex post facto* rationalizations for Commission action.[25]

Second, assuming that such contentions are in fact accurate, at best the Government's argument boils

[25] Pub. Serv. Comm'n of N.Y. v. FPC, 436 F.2d 904, 905-06 (D.C. Cir. 1970).

down to an assertion that some of the general programs the FPC carries out under parts II and III of the Federal Power Act on behalf of the general public have some beneficial impact on the electric utility industry. *Res ipsa loquitor.* Since the electric utility industry is also part of the general public, that result is inevitable and is true of a wide variety of federal programs, such as those relating to labor relations, health, safety, welfare, and equal employment opportunity. Such programs all promote social objectives which Congress has declared to be in the public interest, and to the extent that they are attained they undoubtedly provide "business stability" and assure "public confidence" in the electric utility industry, but they are clearly not the kind of "special benefits" which Congress envisaged justifying the imposition of fees under Title V.

The Government faults the court below for its purported "virtual nullification" of Title V (Br. 21-22):

> Every regulatory agency and every program enacted into law by Congress is intended principally to serve the public interest. If the fact that the public is the principal intended beneficiary of a particular program is sufficient to defeat an assessment under Title V, then the statute could virtually never be successfully invoked (except, perhaps, by showing that a program was not achieving its intended effect of benefiting the public interest) and the congressional goal, expressed in the Act, that work performed by federal agencies be "self-sustaining to the full extent possible", would be defeated.

But this *in terrorem* argument cannot be taken seriously. All of the special benefits for which federal agencies, including the Commission, charge filing or

license fees also confer benefits on the general public and yet the validity of such charges is well established[26] and are not disputed here.

The fallacy of the Government's argument is that it wholly ignores the emphasis which Congress and the Budget Bureau have carefully given to the essential "*special* beneft" justification for the levying of fees. If the Government's rationale were adopted, to use its own *in terrorem* approach, the door would be open to loading the costs of a wide variety of federal programs on any industry or group which an executive agency could show was impacted by its particular program, and therefore an arguable "beneficiary". It is not necessary to elaborate on the great potential for abuse of the authority conferred in Title V inherent in the Government's position to make it obvious that Congresss never intended to confer such sweeping authority on the executive and regulatory agencies.

V. THE FEDERAL POWER COMMISSION HAD PREVIOUSLY CONSISTENTLY CONSTRUED TITLE V AS HAVING LIMITED SCOPE

Until it initiated the proposal to assess the annual charges which are at issue, the FPC consistently viewed the fee-charging authority conferred by Title V as relating only to specific functions of a licensing nature. Thus in the next session of Congress after enactment of Title V the Commission first told the House Appropriations Committee that it would need new legislative authority to impose fees for granting

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[26] *Aeronautical Radio, Inc.* v. *U.S.*., 335 F. 2d 304 (7th Cir. 1964).

certificates of public convenience and necessity under the Natural Gas Act:[27]

> Mr. Sechrest. We collect no fees under the Natural Gas Act.
>
> Mr. Thomas. Why?
>
> Mr. Sechrest. We have no authority of law like we do under part 1 of the Federal Power Act. On the question of fees we have reviewed that problem, and we have increased the price of our publications about 50 percent.
>
> Mr. Thomas. Will it require legislation to charge a fee under the gas regulation activities?
>
> Mr. Sechrest. You might charge some minor fees. I would like to have Mr. Ross answer that question.
>
> Mr. Ross. I believe that it would require legislation to make charges, such as we do under part 1 of the Federal Power Act, where we assess charges which cover the cost of administration of that part of it, and that is specifically provided for in the Federal Power Act. We have no authority to charge such things under the Natural Gas Act.
>
> Mr. Thomas. You think it would require legislation to give you that authority?
>
> Mr. Ross. Yes.

The Commission later wrote the committee and explained that on reconsideration it had concluded that

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[27] *Hearings Before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1953*, 82nd Cong., 2d Sess. 559-60 (1952).

it had obtained limited authority under Title V to impose fees in connection with certain licensing and authorization regulatory activities:[28]

> During the hearing held January 23 on the Commission's appropriation request for fiscal year 1953, the statement was made (transcript pp. 1403-1404) that further legislation would be required to authorize the Commission to impose fees for services *similar to those authorized in Part I of the Federal Power Act.*
>
> Further consideration of the question since the date of the hearing indicates that Title V of the Independent Offices Appropriation Act, 1952, authorizes the Commission to impose fees *in connection with the issuance of certificates and other authorizations* under the Federal Power and Natural Gas Act.
>
> The Commission is now considering the advisability of levying such fees and charges in connection with its various regulatory duties.

The Government relies on the foregoing exchange to support its argument that Title V "was obviously intended to provide for charges in cases where no such authorization previously existed". (Br. 23, n. 15.) Although technically accurate to a limited degree, that assertion is obviously overly broad in the context of the issue before the Court. A more accurate appraisal is that neither Committee Chairman Thomas, who had been a principal architect of Title V a year earlier, nor

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[28] *Id.* at 560 (emphasis added).

the Commission viewed Title V as conferring the sweeping authority the Commission now asserts.[29]

Two years later FPC Chairman Kuykendall advised the committee that the Commission was "pre-

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[29] In several other instances the Government, unable to find support for its contentions in either the hearings, committee reports, or debates on Title V, falls back on bits and pieces from hearings and reports in later Congresses. (Br. 6, 7, 24-25). Such *ex post facto* legislative events are of "very little, if any, significance." *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968). In any event, they do not support the Government's position. The recommendations by the appropriations committees in the 90th Congress that the agencies review their fee schedules (Br. 6) do not focus on the issue before the Court. Even more remote are the inferences the Government would draw from expressions by the House Appropriations Committee chairmen in 1970 and 1972, 20 years after the enactment of Title V, with respect to the fee policies of the regulatory agencies (Br. 7, n.3; 24-25, n.16).

To the extent that subsequent legislative activity might be considered relevant by the Court, NEPCO would point to the 1952 hearings before the Senate Committee on Interstate and Foreign Commerce in connection with the fee policy of the Interstate Commerce Commission. S. 2352 had been introduced to amend section 18 of the Interstate Commerce Act to provide that:

> Each person holding a certificate, permit, or license under this Act shall pay to the Commission annually such license fee as the Commission shall determine to be fair and reasonable for such certificate, permit, or license for the purpose of reimbursing the United States for the costs of administering this Act. Such fees shall be covered into the Treasury.

This language would in unmistakable terms have authorized the Interstate Commerce Commission to impose annual assessments against persons licensed by that agency for the costs of administering the Interstate Commerce Act, in the pattern of § 10(e) of the Federal Power Act. In the Senate hearings on the bill, neither proponents or opponents of the bill took the position that Congress had already conferred such authority on the ICC and other agencies a year earlier in Title V. S.2352 was not reported out of Committee. See S. Rep. No. 1467, 84th Cong., 2nd Sess. (1956).

paring regulations, to be promulgated under authority of Title V of the Independent Offices Appropriation Act of 1952, designed to receive approximately $500,000 per year, through filing and certificating fees, to reimburse the Government for the costs of certificating natural-gas facilities," and stressed that "no reasonable opportunity to increase collections on a legal and equitable basis will be overlooked."[30] However, the Commission struggled with the question of its legal authority to implement even such filing fees until 1965.[31] In its notice of proposed rule-making which eventually resulted in Order No. 317 establishing a schedule of fees to be paid by applicants for natural gas pipeline certificates and other authorizations under the Natural Gas Act, the Commission explained its reasons for limiting the establishment of fees to the recoupment of costs associated with the processing of applications:[32]

> 3. The regulatory activities of the Federal Power Commission convey special benefits to

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[30] *Hearings on Independent Offices Appropriations for 1955 Before a Subcommittee of the House Committee on Appropriations*, 83rd Cong., 2d Sess. 323 (1954). The referenced Natural Gas Act filing fees were not implemented until 1966. 35 F.P.C. 30, 392.

[31] In response to the continuing study of user charges by the Senate Government Operations Committee, Chairman Kuykendall later wrote to Senator McClellan in November 1955 in response to a series of questions on user charges and expressed the opinion that Title V afforded no adequate guidance as to when a particular federal activity, such as the Commission's licensing and regulatory functions, constituted a special benefit to a particular group. He pointed out that "what seems lacking is the necessary particularity as to the distinction between 'services' to particular groups and 'service' in the public interest."

[32] Notice of Proposed Rulemaking, Docket No. R-282, issued September 22, 1965, 30 F.R. 12077 (emphasis added).

identifiable recipients above and beyond those which accrue to the public at large. Congress has adopted the policy that the recipient of special benefits conveyed by a Federal agency program should pay a reasonable charge to defray the cost of the program and to relieve the general taxpayer who bears the major burden of supporting Federal agencies. The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate *since these activities are primarily for the benefit of the general public rather than the regulated companies.* The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons. The Commission already assesses charges against hydro-electric licensees for the purpose of defraying the costs of administration of Part I of the Federal Power Act (16 U.S.C. 803(e)).

The Commission's 1965 rationale comports fully with the Congressional intent underlying Title V. Its recent change of mind[33] must be weighed against almost twenty years of consistent administrative construction by the Commission which gave Title V sig-

[33] The Commission now simply states that it no longer agrees with its 1965 interpretation. R. 264

nificantly more limited applicability than the part of the order set aside by the court below.

The Government cites no other agency which has taken such an expansive view of Title V as the Commission now asserts, and our research has uncovered none. A number of agencies have established filing fees of the kind which are not in dispute here.[34] Others charge a fee when a license or certificate is issued[35] and sometimes a nominal annual charge is assessed on the licensees.[36] However, none has sought to recover broad program costs from an entire industry on the tenuous "economic climate" basis relied on by the Commission. The closest similar action appears to be that of the FCC in assessing annual fees on the CATV industry, which is in issue in *National Cable Television Asso.* v. *U.S.*, No. 72-948, now pending before the Court. Even there, however, the court below purported to find a "special benefits" basis for the imposition of the FCC charges.[37] Whether or not the CATV annual fee issue was correctly decided, the industry and regulatory differences involved clearly make that decision distinguishable from the invalida-

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[34] See, e.g., 14 C.F.R. § 389.25 (Civil Aeronautics Board); 49 C.F.R. § 1002.2 (Interstate Commerce Commission); 10 C.F.R. §§ 170.12(a), 170.21 (Atomic Energy Commission); 17 C.F.R. § 240.12b-7 (Securities and Exchange Commission).

[35] 10 C.F.R. §§170.12(b), 170.21 (Atomic Energy Commission); 14 C.F.R. § 389.25(a)(2) (Civil Aeronautics Board); 17 C.F.R. § 240.15b9-1 (Securities and Exchange Commission).

[36] 17 C.F.R. §§ 240.15b9-2; 275.203-3 (Securities and Exchange Commission); 10 C.F.R. §§ 170.12(c), 170.21 (Atomic Energy Commission).

[37] *Clay Broadcasting Corp.* v. *U.S.*, 464 F. 2d 1313, 1322 (5th Cir. 1972), cert. granted *sub nom. National Cable Television Asso.* v. *U.S.*, No. 72-948.

tion of the FPC charges for the administration of parts II and III of the Federal Power Act involved in this case.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed insofar as it relates to annual assessments for FPC activities under the Federal Power Act.

Respectfully submitted,

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Attorneys for New England Power Company, Respondent

September 19, 1973

APPENDIX A

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

May 21, 1951

BULLETIN No. 51-13

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Charges for Government services and products

1. *Purpose.* The attached form, Government Charges Questionnaire, Exhibit 51-13, is designed to obtain information needed for a comprehensive survey of the existing system of Government charges. As the first part of such a survey, there will be prepared a complete list of services and products provided the public with or without charge. Following the preparation of such a list, an analysis of certain types of charges will be made. One of the purposes of the analysis will be to determine whether present charges are adequate and whether charges should be made for certain goods and services now provided free.

The President has stated that "While it is not sound public policy to charge for all services of the Federal Government on a full cost basis, and many services should be provided free, the Government should receive adequate compensation for certain services primarily of direct benefit to limited groups."

Congressional and public interest concerning the adequacy of fees for Government services has been growing. In the last session of Congress, the Senate Committee on Expenditures in the Executive Departments made a sample study covering 12 agencies and issued Senate Report No. 2120, "Fees for Special Services." The House Ways and Means Committee passed a resolution on December 7, 1950, requesting the Bureau of the Budget to proceed with a

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EXECUTIVE OFFICE OF THE PRESIDENT
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study of charges for services provided by the Federal Government. The House Committee on Appropriations has proposed a section on this subject in the Independent Offices Appropriation Bill, 1952; the Committee's views are set forth in House Report No. 384.

2. *Coverage.* The provisions of this Bulletin apply to all Federal departments and establishments except the municipal government of the District of Columbia.

3. *General instructions.* It is suggested that each agency attempt to obtain the advice and opinions of responsible operating staff members who deal most directly with persons now paying Government charges and with persons now enjoying the benefits of those Government goods and services provided without charge. Comments and suggestions from field office staff regarding the feasibility and advisability of changing current practices, therefore, will be especially valuable.

[1]

The questionnaire covers all goods and services which are of direct benefit to limited groups of individuals, businesses, and other organizations. Services which are provided to identifiable individuals, businesses, or other organizations should be reported even though they are also indirectly of benefit to the general public. Services provided Federal employees (including members of the armed forces) and their dependents should be reported unless they are legally part of the employees' compensation. Goods and services provided on a cost contract basis are also to be reported. Intragovernmental services (for example, services provided for one agency by another through working funds) are not to be reported.

The types of goods and services provided by the Government which should be reported on Exhibit 51-13 are listed below. This list also shows the classes of miscel-

laneous receipts accounts of the Treasury into which charges now made for these goods and services are deposited.

Type of goods or services	*Class of miscellaneous receipts accounts*
(1) Coinage services	(1) Coinage
(2) Permits, licenses, and other registration services	(2) Fees for permits and licenses
(3) Use of money (through loans and advances)	(3) (Interest (Dividends and other earnings
(4) Use of property	(4) Rents
(5) Leases for obtaining minerals, oil, gas, etc. (6) Use of patents, copyrights, etc.	(5) and (6) Royalties
(7) Other products provided	(7) Sale of products
(8) Other services provided	(8) Fees and other charges for services

• • • • • • • • • • •

APPENDIX B

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

BULLETIN No. 58-3 November 13, 1957

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User charges for certain Government services

1. *Purpose.* This Bulletin calls for the preparation of legislative proposals essential for the development of an equitable and uniform Government-wide policy on charges for certain Government services or property.

Following a careful and thorough joint interdepartmental review of this problem, the President has approved the recommendations made to him. The review, including these recommendations, is attached for information and guidance.

The President has requested the Bureau of the Budget to initiate actions in accordance with those approved recommendations. This Bulletin therefore requests each executive agency to prepare legislative proposals for removing all present limitations or restrictions on the agency's authority to (a) recover full costs for Government services which provide a special benefit; and (b) obtain a fair market value for Government-owned resources or properties sold or leased.

This Bulletin supersedes Bureau of the Budget Circular No. A-25 dated November 5, 1953, the coverage of which was more limited.

2. *Coverage.* Except for the specific exclusions mentioned later in this Bulletin, the legislative proposals should include all areas in which existing legislation prohibits or restricts the application of charges or fees. The proposals should also include areas in which existing legislation is silent on the subject of such charges but where the agency considers an expression of congressional policy desirable prior to initiating charges.

Legislation shall be considered restrictive when it does not permit full cost recovery by the Federal Government for Federal services or products provided which convey to some recipients a special benefit above and beyond that accruing to the public at large. In addition, legislation shall be considered restrictive if it hampers (a) the realization of a fair market value from the sale or use of federally owned resources or property or (b) the application of sound business management principles and comparable commercial practices in the sale of such resources and property.

[1]

The areas excluded from the attached document (see second paragraph under "Coverage") are also excluded from the provisions of this Bulletin. In addition, this Bulletin does not apply to the disposal of property under approved programs to charitable, governmental, and related agencies or instrumentalities.

3. *Data to be submitted.* Legislative proposals will be submitted to the Bureau of the Budget in accordance with Circular A-19, Revised, not later than February 1, 1958. They shall be accompanied by a short explanation of their background and effect.

4. *Other actions.* In those areas where present legislative authority is adequate and no legislative proposal is submitted, the head of each agency should determine and act on applying user charges in his agency in accordance with the recommendations in the attached report and the provisions of existing law. These actions should not be deferred pending efforts to remove or clarify legislation restricting user charges in other areas.

By direction of the President:

PERCIVAL F. BRUNDAGE
Director

Attachment

[2]

APPENDIX C

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON, D. C. 20503

September 23, 1959 CIRCULAR No. A-25

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User Charges

1. *Purpose.* Bureau of the Budget Bulletin No. 58-3 of November 13, 1957, set forth some general policies for developing an equitable and uniform system of charges for certain Government services and property. This Circular incorporates the policies contained in that Bulletin and gives further information with respect to: (a) the scope of user charge activities; (b) guidelines for carrying out the approved policies; and (c) agency submission of periodic status reports. It also prescribes Standard Form No. 4 on which periodic status reports are required.

Because this Circular applies also to the areas previously covered by Bureau of the Budget Circular No. A-28 of January 23, 1954, that Circular is hereby rescinded.

2. *Coverage.* Except for exclusions specifically made hereafter, the provisions of this Circular cover all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large. The specific exclusions which continue to be governed by separate policies are fringe benefits for military personnel and civilian employees; sale or disposal under approved programs of surplus property; postal rates; interest rates; and fee aspects of certain water resources projects (power, flood control, and irrigation). In addition this Circular does not apply to activities of the legislative and judicial branches, the municipal government of the District of Columbia, the Panama Canal Company or the Canal Zone Government.

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a

measurable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

[1]

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

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[2]

Syllabus

FEDERAL POWER COMMISSION *v.* NEW ENGLAND POWER CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1162. Argued December 3, 1973—Decided March 4, 1974

The Independent Offices Appropriation Act, 1952 (the Act) authorizes each federal agency to prescribe a fee, charge, or price for services provided by the agency "to or for any person (including groups . . .)," determined to be fair and equitable, consideration being taken of "direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . ." Pursuant to the Act, the Federal Power Commission imposed an annual assessment against all jurisdictional electric utilities in proportion to their wholesale sales and interchange of electricity, and against all natural gas companies with operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. On petitions for review, the Court of Appeals set aside these annual charges, holding that whole industries are not in the category of those who may be assessed under the Act, the thrust of which reaches only specific charges for specific services to specific individuals or companies. *Held:*

1. While the Act includes services rendered "to or for any person (including groups . . .)," since the Act is to be construed to cover only "fees" and not "taxes," *National Cable Television Assn.* v. *United States*, *ante*, p. 336, the "fee" presupposes an application for the agency's services, whether by a single company or group of companies or the receipt of a specific beneficial service. P. 349.

2. The Act is to be construed as authorizing a reasonable charge to "each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit," and as precluding a charge for services rendered "when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public." Pp. 349–351.

151 U. S. App. D. C. 371, 467 F. 2d 425, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the result, in which BRENNAN, J., joined, *post*, p. 352. BLACKMUN and POWELL, JJ., took no part in the decision of the case.

Keith A. Jones argued the cause for petitioner. On the brief were *Solicitor General Bork, Leo A. Forquer*, and *George W. McHenry, Jr.*

Thomas M. Debevoise and *Stanley M. Morley* argued the cause for respondents. With *Mr. Debevoise* on the brief for respondent New England Power Co. were *William J. Madden, Jr.*, and *Jerome C. Muys*. With *Mr. Morley* on the brief for respondent Independent Natural Gas Association of America were *Jerome J. McGrath* and *Francis H. Caskin*. *L. F. Cadenhead* and *Melvin Richter* were on the brief for respondent Tennessee Gas Pipeline Co., a division of Tenneco, Inc.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, companion to *National Cable Television Assn.* v. *United States, ante*, p. 336, raises another important problem of construction of the provisions of the Independent Offices Appropriation Act, 1952, Tit. 5, 65 Stat. 290, 31 U. S. C. § 483a. The Federal Power Commission established filing fees under the Natural Gas Act and under the Federal Power Act. These filing fees have not been challenged. What was challenged were annual assessments under both Acts, levied in an effort of the agency to recoup some of the remaining costs under the two Acts.

With respect to electric utilities, the Commission determines each year the costs of administering the Federal Power Act. The costs associated with the Commission's efforts to promote the co-ordination and

reliability of nonjurisdictional electric systems are not included. The Commission also deducts from administration costs the costs associated with services rendered to electric systems not subject to the Commission's jurisdiction and the amount received during the year from filing fees. The remaining balance is assessed against jurisdictional utilities[1] in proportion to their wholesale sales and interchange of electricity. In 1971 these companies had gross revenues of some $21 billion and net income of nearly $4 billion. The annual assessment challenged here involved 1973 and for all such electric companies was $5 million or 0.024% of gross revenue and 0.14% of net income.

As respects natural gas companies, the Commission determines each year the costs of administering the natural gas pipeline programs under the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717 *et seq.* These costs, after deducting amounts received from filing fees, are assessed against all natural gas companies with annual operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. In addition, all natural gas companies required to file an annual report on their total gas supply (18 CFR § 260.7) are assessed one-tenth of a mill for each thousand cubic feet of new reserves of natural gas certificated each year to support the cost of the producer certificate program.

[1] Part I of the Federal Power Act covering licenses to hydroelectric companies, see 16 U. S. C. § 797 *et seq.*, is not involved in this litigation, only Parts II, 49 Stat. 847, 16 U. S. C. § 824 *et seq.*, and III, 49 Stat. 854, 16 U. S. C. § 825 *et seq.* Moreover, the "jurisdictional" aspect of a public utility's activities refers, *inter alia*, to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce as contained in § 201 of the Act, 49 Stat. 847, 16 U. S. C. § 824 *et seq.*, the provision that filled the gap created by *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. See *United States* v. *Public Utilities Comm'n*, 345 U. S. 295.

The Commission in its report, 45 F. P. C. 440 and 964, said as respects both electric utilities and natural gas companies that regulations have provided "the foundation for the sound financial condition which public utilities and natural gas companies have achieved." *Id.*, at 445. It mentioned the "industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system." *Id.*, at 445 n. 5. The Commission, while noting that its regulatory activities were beneficial to consumers, added that its actions:

> "have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands." *Id.*, at 445.

As respects electric utilities it noted that its regime was "system wide and beneficial" to the companies. *Id.*, at 966. As respects natural gas pipelines it listed its activities that were beneficial to them:

> "the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines." *Id.*, at 967.

On petitions for review the Court of Appeals set aside that portion of the Commission's order establishing annual charges, 151 U. S. App. D. C. 371, 467 F. 2d 425. As already noted, the case is here on a petition for certiorari, 411 U. S. 981.

The Act in question, 31 U. S. C. § 483a, authorizes the head of each federal agency to prescribe a "fee, charge, or price" for any "benefit, privilege, . . . license, permit, certificate, registration or similar thing of value . . . provided . . . by [the] Federal agency . . . for any person (including groups, . . . corporations . . .)" which he determines "to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ."

The Court of Appeals held that whole industries are not in the category of those who may be assessed, the thrust of the Act reaching only specific charges for specific services to specific individuals or companies. We agree with the Court of Appeals.

The report on the Act, H. R. Rep. No. 384, 82d Cong., 1st Sess., 2, states that "[t]he Committee is concerned that the Government is not receiving full return from many of the services which it renders to *special beneficiaries*" (emphasis added). It is true that the Act includes services rendered "to or for any person (including groups . . .)." But if we are to construe the Act to cover only "fees" and not "taxes"—as we held should be done in the *National Cable Television* case, *ante*, p. 336, the "fee" presupposes an application whether by a single company or by a group of companies. The Office of Management and Budget (then known as the Bureau of the Budget) issued a circular in 1959 [2] construing the Act. That circular stated that a reasonable charge "should be made to each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit." [3]

[2] Budget Circular No. A-25, Sept. 23, 1959.

[3] The circular goes on to state that the services include agency action which: "provides special benefits . . . above and beyond those

(Emphasis added.) The circular also states that no charge should be made for services rendered, "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." [4]

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which accrue to the public at large . . . . For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

"(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e. g., receiving a patent, crop insurance, or a license to carry on a specific business); or

"(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e. g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

"(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e. g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours)."

[4] Since oral argument we have been advised by the Solicitor General that of all federal agencies "having industry-wide regulatory authority" there are two, other than the Federal Power Commission and the Federal Communications Commission, which impose "annual industry-wide fees analogous" to those in the instant case. The Solicitor General summarizes the actions of the other two federal agencies as follows:

"The fee schedule of the Atomic Energy Commission is set forth at 10 C. F. R. 170.21 and 170.31 and was last revised on October 29, 1973 (38 Fed. Reg. 30254–30255). Under that schedule, operators of nuclear power reactors are subject to a minimum annual fee of $20,000 and operators of other nuclear facilities are subject to annual fees ranging from $8,500 to $215,000. Holders of materials licenses are assessed annual fees of up to $27,000. The Commission estimates that approximately $7 million will be recovered from these annual fees in fiscal year 1974. The Commission's fee schedule, including annual fees, was first adopted in 1968.

"The Securities and Exchange Commission imposes an annual

We believe that is the proper construction of the Act. Though it greatly narrows the Act from the dimensions urged by the Commission, it keeps it within the boundaries of the "fee" system and away from the domain of "taxes" toward which the Commission's "economic climate" argument would lead. Some of the assessments made by the Commission under its formula would be on companies which had no proceedings before the Commission during the year in question. The "identifiable recipient" of a unit of service from which "he derives a special benefit," to quote the Office of Management and Budget, does not describe members of an industry which have neither asked for nor received the Commission's services during the year in question. A blanket ruling by the Commission, say on accounting practices, may not be the result of an application. But each member of the industry which is required to adopt the new accounting system is an "identifiable recipient" of the service and could be charged a fee, if the new system was indeed beneficial to the members of the industry. There may well be other variations of a like nature which would warrant the fixing of a "fee" for services rendered. But what was done here is not within the scope of the Act. Hence the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the decision of this case.

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fee of $100 on each of the approximately 1100 investment advisers registered with it under the Investment Advisors Act of 1940, 15 U. S. C. 80b–1 et seq. See 17 C. F. R. 275.203–3 (b). This fee was first adopted in 1972."

This statement covers only fees imposed under Tit. V, not those authorized "under more specific grants of statutory authority."

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in the result in No. 72–1162 and dissenting in No. 72–948, *ante*, p. 336.

These cases present two distinct issues involving interpretation of the Independent Offices Appropriation Act of 1952: first, whether sufficient "work, service, . . . benefit, . . . or similar thing of value or utility" was conferred on the CATV operators or utility companies to warrant imposition of a fee under the statute; and, second, whether, if a fee was justifiably imposed, the amount of the fee was determined in accordance with a proper interpretation of the statutory standard that it be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." 31 U. S. C. § 483a.

The Court, however, fails to recognize that these issues require independent analysis. Instead, permeating the Court's opinions on both issues is an attempt to draw metaphysical distinctions between a "fee" and a "tax." I do not find this approach either helpful or appropriate; whatever the label, the questions presented in these cases involve simply whether the charges assessed by the Commissions were authorized by Congress. The Court's approach merely beclouds its analysis, producing results which seem to me inconsistent and affording guidance to the agencies in setting their fee policies which might be charitably described as uncertain.

This approach is allegedly based on the need to construe the statute narrowly to avoid constitutional difficulties. I do not believe that any serious question of the constitutionality of the Act would be presented if Congress had in fact authorized these charges. The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative

agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes,[1] at least in the absence of a delegation creating "the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms," *United States* v. *Robel*, 389 U. S. 258, 272 (1967) (BRENNAN, J., concurring). This doctrine is surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963); *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U. S. 156 (1973)—if not more so. It is hardly surprising that, until today's de-

[1] "Lawyers who try to win cases by arguing that congressional delegations are unconstitutional almost invariably do more harm than good to their clients' interests. Unrealistic verbiage in some of the older judicial opinions should not now be taken seriously. The effective law is in accord with a 1940 statement of the Supreme Court: 'Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.' [*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398 (1940).] Much of the judicial talk about requirement of standards is contrary to the action the Supreme Court takes when delegations are made without standards. The vaguest of standards are held adequate, and various delegations without standards have been upheld. . . .

"In only two cases in all American history have congressional delegations to public authorities been held invalid. Neither delegation was to a regularly constituted administrative agency which followed an established procedure designed to afford the customary safeguards to affected parties. The Panama case [*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935)] was influenced by exceptional executive disorganization and in absence of such a special factor would not be followed today. The Schechter case involved excessive delegation of the kind that Congress is not likely again to make. . . .

"In absence of palpable abuse or true congressional abdication, the non-delegation doctrine to which the Supreme Court has in the past often paid lip service is without practical force." 1 K. Davis, Administrative Law Treatise § 2.01 (1958) (footnotes omitted).

cision, the Court had not relied upon *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), almost since the day it was decided.[2]

I have no doubt—and I suspect that a majority of the Court would agree—that Congress could constitutionally authorize the Commissions to impose annual charges of the sort involved here. Surely the congressionally prescribed standards, permitting imposition of fees for work done or service or benefit provided if they are "fair and equitable" taking into account "cost to the Government, value to the recipient, [and] public policy," are sufficiently definite to withstand any conceivable delegation objection. See, *e. g.*, *Yakus* v. *United States*, 321 U. S. 414, 423–427 (1944); *Lichter* v. *United States*, 334 U. S. 742, 783–786 (1948). I therefore see no reason to construe the statute in an artificially narrow way to avoid nonexistent constitutional difficulties.

Even on a neutral reading of the statute and its legislative history, however, I am convinced that Congress did not intend to authorize industrywide annual assessments like those at issue here. The movement in Congress to encourage Government agencies to establish fees to recover some of the costs of providing services to special beneficiaries began in 1950 with a study of the Senate Committee on Expenditures in the Executive Branch which culminated in a report to Congress on "Fees for Special Services." S. Rep. No. 2120, 81st Cong., 2d Sess. (1950). This report concluded that fees should be charged for agency services the benefits of which accrued wholly or primarily to special interests. *Id.*, at 3–4. In particular, the report pointed out that the FCC "renders a tremendous variety of services, a

[2] The last time that the Court relied upon *Schechter Poultry* was in *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936).

substantial number of which would lend themselves to equitable fees." *Id.*, at 4. The report listed the type of services for which assessment of fees would be appropriate: radio station construction permits, radio station operating licenses and renewals, authorization of assignment or transfer of licenses, radio operator licenses, and certificates of public convenience and necessity. *Id.*, at 11.[3]

On the other hand, the report was careful to point out the limited nature of its recommendations. It emphasized that it was not proposing that Government regulation in general be made self-sustaining by shifting the costs to those regulated:

> "There has been no quarrel with the philosophy governing the study that those who receive the benefit of services rendered by the Government especially for them should pay the costs thereof. In the several staff reports and press releases which have been issued, occasion has been taken to reiterate that philosophy and to give reassurance that there is no thought here to establish a system of fees for fundamental Government services, but only to explore the feasibility and fairness of shifting to special beneficiaries the expense now being borne for them by the taxpayers at large." *Id.*, at 3.

These themes were reiterated during the 1951 hearings which led directly to enactment of the Independent Offices Appropriation Act of 1952. Hearings on Independent Offices Appropriations for 1952 before the Subcommittee on Independent Offices of the House Committee on Appropriations, 82d Cong., 1st Sess. (1951). The questions of the committee members reflected their

[3] Similarly, as to the Federal Power Commission, the report suggested that fees could be charged for issuance of licenses and certificates of public convenience. *Id.*, at 12.

concern that the regulatory agencies were not recouping any part of the cost of services which benefited particular special interests. But it is apparent that the Committee had in mind imposition of fees for issuance of licenses, *id.*, at 281, 681, certificates of public convenience and necessity, *id.*, at 281, 524, and the like. And it was recognized that in the absence of this sort of special benefit, imposition of the cost of regulation on those regulated represented a different philosophical approach, as to which there had been in the past substantial resistance. *Id.*, at 730.

The actual language of the Appropriation Act is quite general, and is certainly capable of varying interpretations. But the intended content of the statute's authorization of fees to be charged for "any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility" can be gleaned from this legislative history. When the Committee Report expressed its concern that "the Government is not receiving full return from many of the services which it renders to special beneficiaries," H. R. Rep. No. 384, 82d Cong., 1st Sess., 2 (1951), and suggested that "fees could be charged for other services" "of the type here under consideration," *id.*, at 3, I think that it contemplated imposition of application fees, registration fees, and fees for grants of licenses, permits, or other similar authorizations. This interpretation is consistent with the statutory language, with its long enumeration of specific, readily identifiable, and discrete Commission actions for which fees can be charged. This interpretation is consistent, also, with the explanation of the statute on the floor of the House offered by Representative Yates, in which he cited the award of franchises, licenses, certificates of public convenience and necessity, and construction permits as

examples of benefits for which fees could appropriately be charged by the FCC. 97 Cong. Rec. 4809 (1951).

I see nothing in the legislative history which suggests any broader interpretation of the concept of "benefit" under the Act. On the contrary, since the broader view that the full cost of regulation should be assessed those subject to the agency's jurisdiction in the absence of a "special benefit" would have represented a controversial policy choice, I think that the very lack of debate over this provision of the Act and the ease with which it passed compel the more limited interpretation. The Committee Report itself noted that more "basic" changes in agency fee practice would have to await further study by congressional committees and additional legislation. H. R. Rep. No. 384, 82d Cong., 1st Sess., 2–3 (1951).

I therefore do not believe that the creation of an "economic climate" which fosters the growth of a regulated industry is a sufficiently specific, discrete benefit within the meaning of the Appropriation Act to justify imposition of a fee. Nor do I think that this benefit is conferred upon a sufficiently identifiable recipient to be the basis for assessment of a fee. Accordingly, I agree with the Court's construction of the Act, *ante*, at 349–350, and concur in the result in this case.

I cannot agree, however, with the result in No. 72–948, *National Cable Television Assn.* v. *United States*, *ante*, p. 336. In view of the Court's conclusion in this case, I am mystified as to how the Court can reach its apparent, though completely unexplained, holding in No. 72–948 that operators of CATV systems may receive "special benefits" sufficient to sustain imposition of an annual fee under the Appropriation Act. *Ante*, at 343. In 1970, when the fees at issue here were established, FCC regulation of CATV was quite limited. CATV operators did not receive licenses or any similar authorization from the Commission.

Rather, their franchises were generally awarded by state authorities, to whom the CATV operators pay franchise fees. Although FCC regulations prohibited carriage of distant signals into larger television markets unless Commission authorization was obtained, 47 CFR § 74.1107 (1968),[4] carriage of local signals as well as distant signals into smaller markets was permitted, unless objections were raised, without the need for approval by the Commission. 47 CFR §§ 74.1105 (a), (c) (1968). Many of the CATV operators against whom these annual charges were assessed had no contact at all with the Commission during 1970, and some had never had any dealings with the Commission. The only other FCC regulations of CATV in 1970 pointed to by the Solicitor General are regulations which prohibit telephone companies and television broadcasters from entering the CATV field.[5]

In my view, the mere existence of such regulation cannot justify the annual fees imposed in this case. While these regulations may have been of some benefit to the CATV industry in a very broad sense, I regard the FCC's argument on this point as identical to the FPC's

[4] It would seem clear that fees could appropriately be imposed under the Appropriation Act in connection with application for or issuance of such Commission authorization. However, no such fees are at issue in this case.

[5] Extensive new regulations of CATV were promulgated in 1972. 37 Fed. Reg. 3280 (Feb. 12, 1972). These regulations prescribe in considerable detail the provisions of franchises granted by local authorities to CATV operators, and also limit the franchise fees which may be charged by the localities in which CATV stations operate. Most important for present purposes, the new regulations also provide that a CATV operator must obtain an FCC certificate of compliance before commencing operations; existing cable systems must obtain a certificate of compliance by March 31, 1977. 47 CFR § 76.11 (b) (1973). While these new regulations will undoubtedly affect the question of the permissibility of fees imposed for future years, they cannot retroactively validate fees imposed for 1970.

"economic climate" argument rejected by the Court in this case. I can see no specific benefit provided or service rendered by the Commission on the order of the grant of a license or certificate, processing of an application, or even provision of a new and useful accounting system. Nor do I believe that the benefits of FCC regulation have been conferred on any identifiable recipient; I would think this a classic case where "the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public." *Ante*, at 350.

I would therefore hold that the annual fees imposed in both these cases were not authorized by the statute. But since the Court apparently holds otherwise, and goes on to discuss the standards to be applied by the FCC in setting fees under the statute, I think it appropriate to express my views on this issue. I cannot agree with the Court that the only factor which the Commission may consider in determining the amount of the fees is the "value to the recipient." The statute provides that the fee must be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." This is a perfectly clear and intelligible standard, and I see no reason why, assuming a proper occasion for imposition of a fee, the Commission is not entitled to weigh each of the statutory considerations. It may well be true that the Commission here gave undue emphasis to one of the statutory factors, "cost to the Government." But the Court's response, to require that undue, seemingly exclusive reliance be placed on the standard of "value to the recipient" is, in my opinion, equally erroneous. It is also quite unrealistic and unworkable: How is the Commission to determine whether to set the fee at 1%, 5%, or 50% of the "value to the

recipient" unless it is also free to consider such other factors as "cost to the Government" and "public policy"?

I would leave the Commission free to consider all the statutory standards in setting its fees. Certainly the Commission should be free to consider "cost to the Government," [*] as well as the statutory mandate that the Commission "be self-sustaining to the full extent possible." It could not be clearer, from the language of the statute and from its genesis, that Congress intended these factors to be considered by the Commissions in setting their fee schedules. If the Court seriously believes that this somehow presents a substantial constitutional problem, then the constitutional issue should be squarely faced and resolved; it should not be permitted to justify the Court's rewriting of the statute contrary to congressional intent.

I would affirm the judgment of the Court of Appeals in No. 72-1162 and reverse the judgment in No. 72-948.

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[*] In my view, "cost to the Government" comprehends the cost of FCC regulation of the industry as well as the cost of processing a specific application. While the existence of such regulation is not itself sufficient under the present statute to sustain imposition of a fee, it will often be beneficial to the industry—as the Government's "economic climate" argument suggests—and will play a role in enhancing the "value to the recipient" of the license or other authorization. It is therefore neither unreasonable nor inconsistent with the statutory intent that the contribution of this regulation be considered.